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No. 2974

United States
1099
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff in Error,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Filed

APR 23 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

(Amended Complaint.)

Comes now plaintiff above named, and by permission of the Court first had and obtained, files this its amended complaint herein, and for cause of action complains of defendant and alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business, in the city and county of San Francisco, State of California, Northern District thereof; and defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco.

II.

That defendant is indebted to plaintiff in the sum of \$16,961.30, with interest thereon as hereinafter stated, for money had and received by defendant to and for the use of plaintiff within two years prior to the time of the commencement of this action, to wit, on the 18th day of November, 1912, at said city and county of San Francisco, defendant received from [1*] plaintiff the sum of \$9,821.30, and at the same place on the 26th day of November, 1912, defendant further received from plaintiff the sum of \$7,140, all to and for the latter's use, making the total amount so received by defendant from plaintiff as aforesaid the said sum of \$16,961.30.

III.

That no part of said sum of \$16,961.30 has ever been paid by or on behalf of defendant to plaintiff, although demand has been made therefor; and said amount of \$16,961.30, together with interest thereon from the respective dates of payment aforesaid, at the rate of seven per cent per annum, is now wholly due, owing and unpaid from defendant to plaintiff.

And for a further, separate and second cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business, in the city

*Page-number appearing at foot of page of original certified Transcript of Record.

and county of San Francisco, State of California, Northern District thereof; and defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract for the purchase by plaintiff and sale by defendant of certain salmon thereafter to be packed, shipped and transported by defendant to said city and county of San Francisco, and there delivered to plaintiff, a copy [2] of which contract is hereunto annexed for reference and marked Exhibit "A."

That as a part of said contract it was understood and agreed by plaintiff and defendant that said "Archer" brand salmon would be merchantable, edible and suitable for human consumption and of the condition and quality that would entitle it by law to be brought into said city and county of San Francisco and thereafter sold.

III.

That after entering into said contract defendant packed and thereupon shipped and transported from Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of October, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of salmon known as do-over grade of Red Alaska salmon labeled and

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further known as "Archer" brand. Plaintiff received said salmon without inspecting or examining it, or any part of it, and in reliance upon the representations theretofore made respecting it and samples theretofore given by defendant to plaintiff as hereinafter narrated.

IV.

That before the delivery to and receipt by plaintiff of said "Archer" brand salmon defendant represented to plaintiff that said salmon was merchantable, edible, fit for human consumption, and of the condition and quality that entitled it by law to be brought into said city and county and thereafter sold; and defendant submitted to plaintiff a certain quantity of salmon which was then and there represented by defendant to be true samples of the kind, character and condition of said "Archer" brand of salmon, and which defendant claimed would be delivered to plaintiff under said contract. Said samples were thereupon inspected and examined by plaintiff and ascertained to consist [3] of salmon which was edible, fit for human consumption, merchantable, and equal in quality and condition to the 1911 pack of said salmon, which was also edible and fit for human consumption. Without opening each tin of salmon it was and is impossible to determine whether the same was or is edible, fit for human consumption and merchantable, or unmerchantable, inedible, tainted, putrid, sour, decomposed or rotten; and the expressions contained in said contract, to wit, " 'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty

tins to be taken therefrom, after which no reclamation of any natures will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties hereto to mean that after defendant had removed from said salmon all swells, so called, and rusty tins, whose presence can be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon to determine whether all of said swells and rusty tins had been so removed therefrom, and thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were, or should thereafter become, or develop, swells, or whose tins were rusty or should develop rust.

V.

That shortly after the delivery by defendant to plaintiff of said 5,000 cases of "Archer" brand salmon, and in sole reliance upon said samples and representations, and in the belief that said 5,000 cases of said "Archer" brand salmon was merchantable, edible and fit for human consumption, and a proper article of commerce, and in ignorance of the actual quality and condition of said 5,000 cases of "Archer" brand salmon, hereinafter set forth, plaintiff paid to defendant therefor the sum of \$16,961.30 at the times and in the amounts, respectively, as follows, to wit, on November 18, 1912, the sum of \$9,821.30, and on November 26, 1912, the sum of \$7,140, being the entire purchase price of said salmon called for in and by said contract. [4]

VI.

That said 5,000 cases of "Archer" brand salmon

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was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was so delivered by defendant to plaintiff as aforesaid, merchantable, edible or fit for human consumption, but, on the other hand, was unmerchantable, inedible, tainted, putrid, sour, decomposed and rotten, and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907; and its shipment, transportation and delivery to plaintiff as aforesaid and all traffic in said merchandise was and is in violation of each of said Acts.

VII.

That the sole consideration for the payment by plaintiff to defendant of said sum of \$16,961.30 as aforesaid was and is the delivery to plaintiff of 5,000 cases of said "Archer" brand do-over grade of Red Alaska Salmon in an edible condition and suitable for human consumption and a legitimate article of commerce.

VIII.

That at, or shortly after, the time of the shipment, transportation and delivery of said "Archer" brand

of salmon to, and payment therefor by, plaintiff, as aforesaid, and prior to the time of the commencement of this action, defendant well knew of the true condition and quality of said merchandise, and that the same was in the condition and of the quality hereinbefore set forth when it arrived at said city and county of San Francisco [5] and was delivered as aforesaid; but defendant has failed, neglected and refused to return or pay to plaintiff said sum of \$16,961.30, or any part thereof, or any interest thereon, and no part of said money has been paid or returned by or on behalf of defendant to plaintiff.

And for a further, separate and third cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business in the city and county of San Francisco, State of California, Northern District thereof; and plaintiff at all the times herein stated was, and is now, engaged in the business, among other things, of buying, selling and exporting canned goods, including salmon.

Defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco;

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and defendant was at all of such times, and is now, engaged in the business of packing, transporting and selling salmon to the trade therein.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract, a copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof, wherein and whereby plaintiff agreed to purchase, and defendant agreed to sell, certain salmon of the kind, quality and quantity, and subject to the terms, conditions and agreements therein expressed and contained, and as expressed and contained in the act of [6] Congress and act of the legislature of said State of California hereinafter referred to. Among other things, it was and is provided in said contract that said salmon should be equal to the 1911 pack, meaning thereby that said salmon should be equal in quality and condition to the same brand of salmon, to wit, "Archer" brand, packed by defendant in the year 1911, which was of good quality and condition, edible and suitable for human consumption; and it was also therein understood and agreed that said salmon should not be adulterated within the meaning of said act of Congress and said act of the legislature and should be merchantable and a proper subject for commerce thereunder.

III.

That at all times herein stated defendant well knew that plaintiff was engaged in the business of buying, exporting and selling to the trade therein, as aforesaid, canned salmon, among other articles

of commerce, and at the time said contract was entered into as aforesaid none of the salmon therein referred to had been packed, but the same was to be thereafter packed by defendant in Alaska and shipped by it to said city and county of San Francisco, and there delivered to plaintiff.

IV.

That after entering into said contract defendant packed during the year 1912, and thereupon shipped and transported from said Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of November, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of said salmon known as do-over grade of Red Alaska Salmon, "Archer" brand. Plaintiff received said salmon without inspecting or examining it, or any part of it, and in reliance upon said contract and samples theretofore given by defendant to plaintiff, as hereinafter narrated. During all the times herein stated it was and is the custom prevailing in the trade of canned salmon, [7] and practiced for several years between the parties hereto, for the seller to furnish to the purchaser thereof samples of the salmon so bought and sold, and in accordance with said custom canned salmon was and is bought and sold in the trade upon samples so furnished, and plaintiff repeatedly so purchased canned salmon from defendant, and not otherwise.

V.

That before the delivery to, and receipt by, plaintiff of said "Archer" brand salmon, defendant submitted to plaintiff a certain quantity of salmon,

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which was then and there represented by defendant to be true samples of the kind, character and condition of said "Archer" brand of salmon, and which defendant claimed would be delivered to plaintiff under said contract. Said samples were thereupon inspected and examined by plaintiff and ascertained to consist of salmon which was edible, fit for human consumption, merchantable, not adulterated within the meaning of the congressional and legislative acts aforesaid, and equal in quality and condition to the said 1911 pack of said salmon. It was and is impossible to determine from a mere inspection of said canned salmon, and without opening each tin of salmon, whether the same was or is edible, fit for human consumption and merchantable, or unmerchantable, inedible, tainted, putrid, sour, decomposed or rotten; and the expressions contained in said contract, to wit, "'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties hereto to mean that after defendant had removed from said salmon all swells, so-called, and rusty tins, whose presence can be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon to determine whether all [8] of said swells and rusty tins had been so removed therefrom, and thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were, or should thereafter become, or

develop, swells, or whose tins were rusty or should develop rust.

VI.

Shortly after the delivery by defendant to plaintiff of said 5,000 cases of "Archer" brand salmon, and in sole reliance upon said contract, samples and representations, and in the belief that said 5,000 cases of said "Archer" brand salmon was merchantable, edible and fit for human consumption and a proper article of commerce, and in ignorance of the actual quality and condition of said 5,000 cases of "Archer" brand salmon, hereinafter set forth, plaintiff paid to defendant therefor the sum of \$16,961.30 at the times and in the amounts, respectively, as follows, to wit, on November 18, 1912, the sum of \$9,821.30, and on November 26, 1912, the sum of \$7,140, being the entire purchase price of said salmon called for in and by said contract.

VII.

That said 5,000 cases of "Archer" brand salmon was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was so delivered by defendant to plaintiff, as aforesaid, merchantable, edible or fit for human consumption, nor equal to said 1911 pack of said salmon; but, on the other hand, was unmerchantable, inedible, tainted, putrid, sour, decomposed and rotten and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State

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of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabelled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an [9] appropriation therefor," approved March 11, 907, hereinbefore referred to, and its shipment, transportation and delivery to plaintiff as aforesaid, and all traffic in said merchandise, was and is in violation of each of said acts.

VIII.

That by reason of defendant's breach of contract, as aforesaid, plaintiff has been damaged in the sum of \$17,404.21, no part whereof has been paid.

And for a further, separate and fourth cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business in the city and county of San Francisco, State of California, Northern District thereof; and plaintiff at all the times herein stated was, and is now, engaged in the business, among other things, of buying, selling and exporting canned goods, including salmon.

Defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of

said State of California, with its principal place of business in said city and county of San Francisco; and defendant was at all of such times, and is now, engaged in the business of packing, transporting and selling salmon to the trade therein.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract, a copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof, wherein and [10] whereby plaintiff agreed to purchase, and defendant agreed to sell, certain salmon of the kind, quality and quantity, subject to the terms, conditions and agreements therein expressed and contained, and as expressed and contained in the Act of Congress and act of the legislature of said State of California hereinafter referred to. Among other things, it was and is provided in said contract that said salmon should be equal to the 1911 pack, meaning thereby that said salmon should be equal in quality and condition to the same brand of salmon, to wit, "Archer" brand, packed by defendant in the year 1911, which was of good quality and condition, edible and suitable for human consumption; and it was also therein understood and agreed that said salmon should not be adulterated within the meaning of said act of Congress and said act of the legislature and should be merchantable and a proper subject for commerce thereunder.

III.

That at all times herein stated defendant well knew that plaintiff was engaged in the business of buying,

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exporting and selling to the trade therein, as aforesaid, canned salmon, among other articles of commerce, and at the time said contract was entered into as aforesaid none of the salmon therein referred to had been packed, but the same was to be thereafter packed by defendant in Alaska and shipped by it to said city and county of San Francisco, and there delivered to plaintiff.

IV.

That after entering into said contract defendant packed during the year 1912, and thereupon shipped and transported from said Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of October, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of said salmon known as do-over grade of Red Alaska salmon, labelled and further known as said "Archer" brand. Plaintiff received said salmon [11] without inspecting or examining it, or any part of it, and in reliance upon defendant's representations hereinafter set forth, and upon said contract and samples theretofore given by defendant to plaintiff, as hereinafter narrated. That during all the times herein stated it was and is the custom prevailing in the trade of canned salmon, and practiced for several years between the parties hereto, for the seller to furnish to the purchaser thereof samples of the salmon so bought and sold, and in accordance with said custom canned salmon was and is bought and sold in the trade upon samples so furnished, and plaintiff repeatedly so purchased canned salmon from defendant, and not otherwise.

V.

That prior to the time of the delivery of said salmon as aforesaid, and in order to induce plaintiff to accept delivery of, and pay for, the same, and to make no inspection or examination thereof, defendant furnished plaintiff with certain cans of salmon which defendant then and there represented to plaintiff to be true samples of the quality, character and condition of said "Archer" brand of salmon mentioned in said contract, said samples consisting of salmon which was edible and suitable for human consumption and equal to said 1911 pack of "Archer" brand do-over salmon. Also before the delivery of said 5,000 cases of salmon defendant represented to plaintiff, as a further inducement to the latter to take said merchandise, that said salmon was the best lot of said "Archer" brand do-over salmon the defendant had ever packed. Upon ascertaining the character, condition and quality of the salmon contained in said samples, and in ignorance of the true quality, condition and character of the 5,000 cases of salmon specified in said contract, plaintiff accepted and took delivery of said 5,000 cases of salmon as aforesaid, and paid defendant therefor thereafter the sum of \$16,961.30 as follows: On November 18, 1912, the sum of \$9,821.30 and on November 26, 1912, [12] the sum of \$7,140.

VI.

That said 5,000 cases of "Archer" brand salmon was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was

so delivered by defendant to plaintiff, as aforesaid, merchantable, edible or fit for human consumption, nor equal to said 1911 pack of said salmon; but, on the other hand, was unmerchantable, inedible, tainted, putrid, sour, decomposed and rotten and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabelled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907, hereinbefore referred to, and its shipment, transportation and delivery to plaintiff as aforesaid, and all traffic in said merchandise, was and is in violation of each of said acts.

VII.

Plaintiff further alleges that by reason of the representations so made by defendant as aforesaid, and the furnishing by it of samples to plaintiff, as hereinbefore set forth, prior to the time of the delivery of said merchandise, defendant is estopped from asserting or maintaining that inspection of said 5,000 cases of do-over grade of Red Alaska salmon "Archer" brand was required of plaintiff by said contract, or that no recovery for a breach of said contract can be had by plaintiff by reason of its failure to make said inspection.

VIII.

That by reason of the fact aforesaid, plaintiff has been damaged in the sum of \$17,404.21, no part whereof has been paid. [13]

WHEREFORE, plaintiff prays for judgment against defendant for said sum of \$16,961.30, together with interest on the sum of \$9,821.30 thereof from the 18th day of November, 1912, and on the remaining sum of \$7140 thereof from the 26th day of November, 1912, or for such other relief as it may be entitled to receive, together with its costs of suit in this behalf incurred.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

Northern District of California,
City and County of San Francisco,—ss.

L. A. Ward, being first duly sworn, deposes and says:

That he is an officer, to wit, the vice-president of American Trading Company (Pacific Coast), a corporation, plaintiff herein, and makes this verification on behalf of said corporation; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are therein stated on information or belief, and as to those matters he believes it to be true.

L. A. WARD.

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Subscribed and sworn to before me this 18th day of February, 1916.

[Seal]

JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California. [14]

Exhibit "A" to Amended Complaint—Contract.

San Francisco, Cal., Nov. 16th, 1911.

The NORTH ALASKA SALMON COMPANY, of San Francisco, California, have sold and the AMERICAN TRADING COMPANY (Pacific Coast) of the same place have bought all of the seller's 1912 season's pack of the following grades and brands of salmon:

No. 2 Grade of Red Alaska Salmon, labeled "Polar King."

Do-over Grade of Red Alaska Salmon, labeled "Archer."

It is understood that the quantity sold shall not exceed three thousand (3000) cases of "Polar King" brand and five thousand (5,000) cases of "Archer" brand.

PRICE of the "Archer" brand to be eighty-five cents (85¢) per dozen, Net Cash, f. b. o. San Francisco, Cal.

PRICE of the "Polar King" brand to be twenty cents (20¢) per dozen less than the North Alaska Salmon Company's price, in car lots, of No. 1 Red Alaska Salmon, f. o. b. San Francisco, Cal., Net, without the cash discount, when delivered.

Delivery is to be made within thirty days after arrival of vessels from Alaska and goods to be paid

for on presentation of warehouse receipt or delivery documents.

“Archer” brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any natures will be allowed.

Sellers guarantee “Polar King” brand against swells and rusty tins but otherwise goods to be taken “as is,” and no claim of whatever nature is to be made against seller after delivery.

Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack.

The salmon under this contract is sold subject to being packed and safely landed in San Francisco.

It is understood that the “Polar King” label is the property of the buyer and solely under their control. But if for any [15] reason whatsoever the buyer does not take delivery of this purchase within thirty (30) days after arrival, as above specified, then the sellers may dispose of the same as they see fit. If disposed of at a price which is less than that named in this contract, buyer to reimburse seller for the difference.

NORTH ALASKA SALMON COMPANY,

J. P. HALLER,

Manager.

AMERICAN TRADING COMPANY (PACIFIC COAST),

C. R. MORSE, Secretary,

A. B. FIELD,

Witness.

20 *American Trading Company (Pacific Coast)*

Service and receipt of a copy of the within Amended Complaint is hereby admitted this 18th day of February, 1916.

WISE & O'CONNOR,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 18, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

Demurrer to Second Amended Complaint.

Now comes the defendant above named and demurs to the second amended complaint of plaintiff, designated as the amended complaint, and for cause of demurrer, specified as follows:

(1) That said complaint does not state facts sufficient to constitute a cause of action.

(2) That the first count of said complaint does not state facts sufficient to constitute a cause of action.

(3) That the first count of said complaint is uncertain in this, that it does not appear therein, nor

can it be ascertained therefrom:

(a) How or in what manner defendant became indebted to plaintiff as alleged in paragraph II of said complaint.

(b) For what purpose defendant had or received money for the use of plaintiff.

(4) That the first count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(5) That the first count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(6) That the second count of said complaint does not state facts sufficient to constitute a cause of action. [17]

(7) That the second count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) Whether the understanding and agreement referred to in paragraph II of said second count of said complaint was in writing, and if so, what consideration, if any, there was for such agreement.

(b) Whether or not defendant ever refused plaintiff the opportunity of inspecting any of the five thousand cases of Archer Brand salmon referred to in said second count of said complaint.

(c) What, if any, damage plaintiff has suffered by reason of any breach of any warranty by defendant.

(8) That the said second count of said complaint

is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(9) That the said second count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(10) That two causes of action are improperly joined in said second count, to wit, an alleged cause of action for the breach of a warranty and an alleged cause of action for the rescission and cancellation of a contract, on the ground of failure of consideration.

(11) That the third count of said complaint does not state facts sufficient to constitute a cause of action.

(12) That the third count of said complaint does not state facts sufficient to constitute a cause of action.

(13) That the said third count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) How or in what manner plaintiff has been damaged in the sum of \$17,404.21 by reason of the alleged breach of contract referred [18] to in paragraph VIII of said third count of said complaint.

(b) Whether or not the salmon of the 1912 pack referred to in said third count was equal in quality to the salmon of the 1911 pack.

(14) That said third count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(15) That said third count of said complaint is

unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(16) That several causes of action have been improperly united in said third count of said complaint, to wit, an alleged cause of action for damages for breach of contract and an alleged cause of action for fraud in the execution of the contract referred to in said third count of said complaint and an alleged cause of action for fraud in misrepresenting the fact that samples submitted by defendant to plaintiff were taken from the 1912 pack of salmon contracted for by plaintiff.

(17) That the fourth cause of action set forth in said complaint does not state facts sufficient to constitute a cause of action.

(18) That said fourth count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) How or in what manner plaintiff has been damaged as alleged in paragraph VIII of said fourth count of said complaint in the sum of \$17,404.21.

(b) Whether or not plaintiff ever rescinded the contract referred to in said fourth count of said complaint, upon ascertaining the fraud alleged in paragraph V thereof.

(c) Whether or not the custom referred to in paragraph IV of said fourth count of said complaint is claimed by plaintiff to be a part of the contract between plaintiff and defendant set up [19] in said fourth count.

(d) For what reason defendant is estopped from asserting or maintaining that inspection of said Archer Brand was required of plaintiff.

(19) That said fourth count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(20) That said fourth count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(21) That said complaint and each and every count thereof is barred by section 337 and section 339, subdivision 1, of the Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays to be hence dismissed, with its costs of suit in this behalf incurred.

WISE & O'CONNOR,
Attorneys for Defendant.

Receipt of a copy of the within demurrer admitted this 20th day of March, 1916.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 20, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the March term, A. D. 1916, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 1st day of May, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,744.

AMERICAN TRADING COMPANY-

vs.

NORTH ALASKA SALMON COMPANY.

**(Order Overruling Demurrer in Part and Sustaining
Demurrer in Part.)**

Defendant's demurrer to the amended complaint (entitled defendant's "demurrer to second amended complaint") heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said demurrer be and the same is hereby sustained as to the 1st and 3d counts, and overruled as to the 2d and 4th counts, of said amended complaint. [21]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

(Answer to Second Amended Complaint.)

Now comes the defendant above named and answering the second amended complaint of plaintiff in the above-entitled action filed February 18, 1916, and designated as "Amended Complaint," admits, denies and alleges as follows:

(1) Admits that on the 16th day of November, 1911, the parties hereto entered into a certain written contract attached to and made a part of said second amended complaint and marked Exhibit "A" therein.

(2) Denies that as a part of said contract, or otherwise, or at all, it was understood or agreed by plaintiff and defendant that said Archer Brand salmon referred to in said Exhibit "A" would be merchantable, edible or suitable for human consumption or of the condition or quality that would entitle it by law to be brought into the said city and

county of San Francisco, State of California, or thereafter sold, and in this behalf, alleges that there was no understanding or agreement with reference to said Archer Brand salmon or any of the merchandise referred to in said Exhibit "A" attached to said second amended complaint, except such written representations and agreements as were contained in said Exhibit "A."

(3) That plaintiff inspected and examined the said Archer Brand salmon delivered to it by defendant on or about [22] the 18th day of October, 1912, and prior to the said date of delivery of said Archer Brand salmon, defendant submitted to plaintiff samples of said shipment, which said samples were taken from said shipment and were selected promiscuously from various cases of said Archer Brand salmon contained in said shipment. Defendant made no representations respecting said samples; that said samples were delivered to plaintiff at its request and suggestion and not pursuant to any understanding or agreement or custom of the trade, but only as a convenience and accommodation to said plaintiff and not by reason of any obligation on the part of defendant, and in this behalf, defendant alleges that it made no representations to plaintiff as to the condition or quality of the salmon contained in said samples.

(4) Denies that at any time, or at all, defendant represented to plaintiff that the said Archer Brand salmon was merchantable, edible, fit for human consumption or of the condition or quality that entitled it by law to be brought into the city and county of

San Francisco, State of California, and thereafter sold, or that defendant made any representations as to the condition or quality of said salmon, or any representations with reference to said salmon at any time, or at all.

Denies that defendant represented to plaintiff that the samples submitted to it in the manner above described were true samples of the kind or character or condition of said Archer Brand salmon, or that defendant made any representations with reference to said samples delivered by it to plaintiff.

(5) Denies that it was impossible to determine, without opening each tin of salmon contained in said shipment of Archer Brand salmon, whether the same was edible or fit for human consumption or merchantable or edible or tainted or putrid or sour or decomposed or rotten, and in this behalf, alleges that it is customary in inspecting a shipment of salmon to select tins from [23] various cases of the shipment and to judge the entire shipment by the samples thus inspected. That if no such samples are selected from a large number of cases of such shipment, an inspection of such samples will accurately determine the character of the entire shipment. That plaintiff could, by examining samples of said Archer Brand salmon, have determined accurately and correctly the exact quality and condition of said salmon. In this behalf, defendant alleges that for a great many years prior to the year 1912, plaintiff and defendant had entered into contracts for the purchase and sale of canned salmon similar to that attached to said second amended

complaint and marked Exhibit "A" therein, and that under said contracts, and each of them, plaintiff was able to and did accurately and correctly determine the exact quality of the salmon contained in said shipments, and each of said shipments, by inspecting cans thereof taken promiscuously from various cases of said shipments. That defendant is informed and believes and therefore alleges that plaintiff did not make such an examination of said shipment of Archer Brand salmon, and in this behalf defendant alleges, that plaintiff was not precluded, nor denied an opportunity to make such inspection and examination, nor was plaintiff induced not to make an examination by any act or statement of this defendant.

(6) Denies that the expressions contained in said contract marked Exhibit "A," attached to and made a part of said second amended complaint, to wit, "Archer Brand of Salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any natures will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties, or either party, or particularly this defendant, to mean that after defendant had removed from said salmon all swells and rusty tins whose presence could be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon [24] to determine whether all of said swells or rusty tins had been so removed, and that

thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were or should thereafter become or develop swells or whose tins were rusty or should develop rust, and in this behalf alleges that said portions of said contract hereinabove specifically set forth were not understood by the parties thereto or by this defendant to have any other meaning than the ordinary meaning to be given thereto, to wit, that after the said shipment had been overhauled and all swells and rusty tins taken therefrom, that no reclamations of any nature were to be allowed; in other words, that this defendant did not warrant the condition or quality of said Archer Brand salmon, or any portion thereof, further than to remove all swells and rusty tins upon the arrival of said shipment in San Francisco.

That this defendant did overhaul said Archer Brand salmon on its arrival in San Francisco, and did remove therefrom all swells and rusty tins, and this defendant did give and afford to plaintiff an opportunity of inspecting the said salmon before delivering the same to plaintiff, and defendant has performed all the terms, covenants and conditions of said contract marked Exhibit "A" and attached to said second amended complaint, on its part to be performed.

(7) Admits that plaintiff paid the sum of \$16,961.30 in the manner described in said second amended complaint, the same being the entire purchase price of said salmon, but denies that said payment was made in reliance upon any representations or warranties made to it by defendant or in ignorance

of the actual quality or condition of said salmon, or that plaintiff was induced to make said payments by reason of any fraud or misrepresentations on the part of this defendant.

(8) Denies that the said Archer Brand salmon was at any time, or at all, or that any portion of it was at any time, or at all, [25] unmarketable, inedible or unfit for human consumption, or was putrid, tainted, rotten, sour or decomposed or was adulterated, within the meaning of the Pure Food and Drug Act of Congress, approved June 30, 1906, or within the meaning of the act of the Legislature of the State of California, entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907, or that defendant in any way or in any manner connected with the shipment or delivery of said Archer Brand salmon, or any portion thereof, acted in violation of the said acts hereinabove referred to, or either of them, and in this behalf defendant further alleges that said shipment of said Archer Brand salmon was in all respects legal and in compliance with the laws of the United States, and of the State of California, and that said salmon was of the quality and condition as warranted in said agreement of November 16, 1911, herein-above referred to as Exhibit "A" attached to said second amended complaint, to wit, that said Archer Brand salmon was equal to the 1911

pack of said Archer Brand salmon in all respects and particulars.

(9) Denies that the consideration for the payment of said sum of \$16,961.30 as aforesaid was or is the delivery to plaintiff of five thousand cases of Archer Brand salmon, do-over grade of Red Alaska salmon in an edible condition or suitable for human consumption or as a legitimate article of commerce and in this behalf, alleges that the consideration therefor was that expressed in said agreement marked Exhibit "A" and attached to said second amended complaint, and that there was no other consideration for the payment of said sum of \$16,961.30 as aforesaid.

(10) That the only knowledge which defendant had of the condition or quality of said Archer Brand salmon was and is that [26] said salmon was at the time of its shipment and at the time of its delivery to plaintiff equal in all respects to the 1911 pack of said Archer Brand salmon, and that said Archer Brand salmon is an inferior grade of salmon, known as do-over salmon, and that this fact was known and understood by plaintiff at the time of the execution of said Exhibit "A" attached to said second amended complaint and at the time of the delivery of said salmon. That in all shipments of do-over grade of Red Alaska salmon, it is customary to find a certain percentage of bad salmon, and this fact was known to plaintiff at the time it entered into said contract, and for that reason defendant alleges that it refused to warrant said Archer Brand salmon, but that said shipment delivered to plaintiff

on or about the 18th day of October, 1912, was in all respects equal to the 1911 pack of said Archer Brand salmon.

Further answering said second amended complaint and particularly answering that portion thereof entitled "further, separate and fourth cause of action," defendant admits, denies and alleges as follows:

(1) Admits the execution of the contract referred to on page 13 of said second amended complaint and admits that the same was executed subject to all the terms, conditions and agreements therein expressed and contained, but denies that said contract was subject to any other terms, conditions or agreements, other than those contained in said agreement which is set forth in said second amended complaint and marked Exhibit "A" therein. That the only warranty of condition or quality of said Archer Brand salmon contained in said written agreement between plaintiff and defendant executed on the 16th day of November, 1911, was that defendant warranted that said goods were equal to the 1911 pack of said Archer Brand salmon. That said warranty was in all respects true and correct. That it was further provided in said agreement that no reclamation of any nature would be allowed after the said [27] "Archer Brand salmon" was overhauled in San Francisco. That this provision of the said agreement referred to the warranty that said salmon would be equal to the 1911 pack. That no claim for reclamation was made by plaintiff prior to the time referred to in said agreement within which claims

for reclamation should be made. That plaintiff accepted said shipment after inspecting the same and that plaintiff at all times knew the quality and condition of the salmon contained in said shipment. That plaintiff examined and inspected said salmon before accepting delivery thereof and that the samples submitted to plaintiff by defendant of the said shipment were furnished at the request of plaintiff, and not otherwise, and no representations were made by defendant as to the nature or quality or condition of said samples, but that said samples were selected in the manner hereinabove described, and not otherwise, and defendant alleges that said samples aforesaid furnished by it to plaintiff were true samples of the quality and condition of the salmon contained in said shipment delivered on or about the 18th day of October, 1912.

(2) Denies that at any time, or at all, it was or is the custom prevailing in the trade of canned salmon for the seller to furnish to the purchaser thereof samples of the salmon so bought or sold, or that there is any custom in the canned salmon industry with reference to furnishing samples of canned salmon, but, on the contrary, the sale of canned salmon depends entirely upon the terms of the respective contracts by which salmon is sold. Defendant admits that it furnished samples of Archer Brand salmon of the 1912 pack to plaintiff and admits that it furnished samples of said Archer Brand salmon in previous years to said plaintiff, but in this behalf alleges that said samples were furnished to plaintiff at its request, and not pursuant to any understanding

or agreement or custom of the trade, but only as a convenience and accommodation to said plaintiff, and not by reason of any obligation on the part of the defendant. [28]

(3) Denies that defendant represented to plaintiff that the samples of salmon furnished by it to plaintiff were true samples of the quality or character or condition of said Archer Brand salmon mentioned in said Exhibit "A" attached to and made a part of said second amended complaint, and in this behalf alleges that the defendant delivered said samples to plaintiff solely at its request and made no representations as to the quality of said salmon, but that said samples were selected from the shipment of Archer Brand salmon sold to plaintiff under said agreement marked Exhibit "A" and attached to said second amended complaint.

(4) Denies that defendant ever represented to plaintiff that the said salmon sold to it under said contract marked Exhibit "A" and attached to said second amended complaint was the best lot of said Archer Brand do-over salmon the defendant had ever packed, or that defendant made any representations to plaintiff as to the quality or condition of said salmon, other than contained in said written contract marked Exhibit "A" and attached to said second amended complaint.

(5) Denies that defendant suppressed any information with reference to said Archer Brand salmon from plaintiff or that plaintiff was induced by any act or omission of defendant to pay the purchase

price of said Archer Brand salmon provided for in said contract marked "A" and attached to said second amended complaint, but on the contrary defendant alleges that the purchase price of said salmon was paid to defendant by plaintiff with full knowledge of all the facts and circumstances with reference to the condition and quality of said salmon and in pursuance of the said contract attached to said second amended complaint and marked Exhibit "A" therein.

(6) Defendant denies that by reason of any act or omission on its part, or by reason of any false representations or any representations made by it to plaintiff, or for any reason, or at all, it should be estopped from asserting or maintaining that inspection [29] of said Archer Brand salmon referred to in said Exhibit "A" attached to said second amended complaint was required of plaintiff by said contract or that no recovery for a breach of said contract can be had by plaintiff by reason of its failure to make said inspection, and denies that by reason of any fact whatever, defendant is estopped from asserting any defense which it may have to this action or from submitting to this court all of the facts in connection with this action.

(7) Denies that for any reason, or at all, plaintiff has been damaged in the sum of \$17,404.21, or any other sum, or at all, or that defendant is indebted to plaintiff in any sum whatever.

(8) That said second amended complaint, and each count thereof, is barred by subdivision 1 of sec-

tion 337 of the Code of Civil Procedure of the State of California and by subdivision 4 of section 338 of the said Code of Civil Procedure.

WHEREFORE, defendant prays to be hence dismissed, with its costs of suit in this behalf incurred.

WISE & O'CONNOR,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

R. E. Cotter, being first duly sworn, deposes and says, that he is an officer, to wit, secretary of the defendant in the above-entitled action; that he has read the above and foregoing answer to the second amended complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and that as to those matters he believes it to be true.

R. E. COTTER.

Subscribed and sworn to before me this 17th day of June, 1916.

[Seal] JULIUS CALMANN,
Notary Public in and for the City and County of
San Francisco, State of California. [30]

Due service and receipt of a copy of the within answer admitted this 17th day of June, 1916.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 19, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of one dollar.

H. E. LONG,
Foreman.

[Endorsed]: Filed October 11, 1916. Walter B. Maling, Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial upon the 26th day of September, 1916, being a day in the July, 1916, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; Samuel Knight and F. E. Boland, Esqrs., appearing as attorneys for plaintiff and Otto Irving Wise, Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 27th and 29th days of September and on the 5th, 6th, 10th and 11th days of October, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of one dollar. H. E. Long, Foreman,"—and the Court having ordered that judgment be entered in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that American Trading Company (Pacific Coast), a corporation, plaintiff, do have and recover of and from North Alaska Salmon Company, a corporation, [33] defendant, the sum of one (\$1.00) dollar.

Judgment entered October 11, 1916.

WALTER B. MALING,
Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Oct. 11, 1916. Walter B. Mal-
ing, Clerk. [34]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

(Bill of Exceptions.)

BE IT REMEMBERED that the above-entitled action came on regularly for trial before the Court, sitting with a jury, on the 26th, 27th and 28th days of September and the 5th, 6th, 10th and 11th days of October, 1916, Honorable W. C. VAN FLEET, United States District Judge, Presiding; Samuel Knight, Esq., and F. E. Boland, Esq., appearing as attorneys for the plaintiff, and Otto Irving Wise, Esq., and Richard S. Goldman, Esq., appearing as attorneys for the defendant.

The jury having been duly empaneled and sworn, the following proceedings were had and testimony and evidence introduced, objections and rulings made, and exceptions taken and allowed.

Thereupon Mr. Knight, on behalf of plaintiff, stated to the jury: In 1911 a contract was made between the parties, a copy of which I have in my hand, and which contract is admitted by the pleadings, providing for the purchase by the [35] plaintiff from the defendant of 5,000 cases of Archer Brand of salmon. Archer Brand is do-over grade of Red Alaska Salmon, labeled "Archer," being a brand which has been packed for a number of years by the North Alaska Salmon Co. to sell to the American Trading Company. The pack was the pack to be put up in the summer of 1912. The contract was dated November 6, 1911. The do-over salmon, we will show you, gentlemen, is a salmon that is re-processed, that is, it is a salmon that in the original cooking a leak is discovered in the can, and if that salmon is re-cooked within a certain length of time, which the witnesses will tell you ranges from 24 hours to 36, the salmon is a perfectly edible salmon.

The contract further provided that the Archer brand of salmon was to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature would be allowed. The buyers have the privilege of inspecting salmon before taking delivery; sellers guaranteeing goods to be equal to the 1911 pack.

The salmon arrived here in the fall of 1912, the

end of the packing season, in October, 1912; the evidence will show that the plaintiff was notified that the salmon was ready for delivery. Before delivery, however, the plaintiff obtained, upon its request, samples. We will show you that it was always customary to buy salmon on samples, and obtaining these samples the plaintiff cut them and found them good, and at the same time and prior to taking delivery, the representative of the plaintiff who attended to this transaction entirely, who was A. B. Field, had a talk with Mr. Haller, the manager of the defendant, and the manager of the defendant told him it was the best lot of do-overs that they had ever put up, [36] and it was too good to be a do-over. The course of practice between the North Alaska Salmon Company and the American Trading Company had ended up to this time in the purchase by the plaintiff and sale by the defendant of a satisfactory salmon; there had been no trouble whatsoever between these companies for several years prior to the time of this transaction that is in controversy; so the plaintiff, relying upon the representations that were made by the defendant, and relying upon the samples that it had received, and believing it was protected by the federal and state Pure Food Acts, and in view of the fact that its course of dealings with defendant had been satisfactory therefore accepted the salmon without examining it, and instructed the defendant where to send the salmon which had already been sold by the plaintiff and where the orders were to be filled from this particular lot; at the same time the plaintiff

paid to the defendant the sum of money represented, approximateley \$17,000—\$16,961.30.

We will show you, gentleman, that it was impossible to make an examination of a tin of salmon unless you opened it; that is, you cannot, looking at a tin of salmon, see whether it is good or not in most cases. When it has what they call a swell, that is a tin that has become bulged by reason of the formation of gases in the salmon, where apparently there has been either salmon impure and filthy at the time it was originally cooked, or else because of leaks in the can, and not large enough to enable those gases to escape, the can would become somewhat out of shape, and that would indicate that there was putrefaction going on inside of the tin; but in many instances, as we shall show you, the tin in most instances containing this putrified stuff, could not be detected from [37] the outside, and it was not until they were opened that the character of their contents would become known. As the result of this stuff going out, the American Trading Company has made attempts to make reclamation on the defendant for the amount of money at any rate which it paid for this salmon, \$16,961.30, and we trust, gentlemen, that when we shall have shown you these facts which I have only sketched in outline, that your verdict will be for the plaintiff for this amount, with interest from the time that we made these payments in November, 1912.

Testimony of A. B. Field, for Plaintiff.

A. B. FIELD, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am and have been for over six years manager of the canned goods department of the American Trading Company; A. B. Field & Company is a department of the American Trading Company, and I am the A. B. Field of that company. I have been engaged in the canned salmon business for over thirty years, and the character of plaintiff's business with reference to canned salmon is and was trading, buying and selling in all markets. I know the North Alaska Salmon Company; it has been engaged in packing Alaska salmon over ten years to my knowledge. The plaintiff had business relations with defendant over several years prior to 1912, and every year during that time plaintiff purchased, among other brands, salmon from defendant known as Archer Brand. This course of business existed over six years prior to 1912. Archer Brand of salmon is known on the market as a do-over or second. A second is the same as a do-over and Archer Brand is composed exclusively [38] of do-over or second salmon. A do-over or second is a salmon that has been re-processed; that is, a salmon that is canned twice.

Q. Can you state, Mr. Field, what you mean by being cooked twice, as far as your knowledge of the salmon industry is concerned?

A. After the first cooking, a certain number of cans are found defective.

(Testimony of A. B. Field.)

The COURT.—By defective you mean from having air holes?

A. Yes, from having air holes in them; some defect of the can itself, probably.

Q. Or imperfect soldering?

A. Imperfect soldering or something.

Mr. KNIGHT.—Q. Then that salmon is put back into the retorts is it, and cooked again? A. Yes.

The COURT.—What is the re-processing?

A. The fish is cooked and then soldered.

Q. Is it cooked to expel the air?

A. Yes, and then soldered.

Mr. KNIGHT.—Q. As I understand it, it is opened, tapped, the air is extracted and then soldered? A. Yes.

Q. Of course you are now speaking of the old style can? A. Entirely so.

Prior to 1912 the defendant packed in what was called old style cans; since then they have used the sanitary can; and for several years prior to 1912 Archer Brand of do-over salmon has been bought and sold commonly in the market [39] as edible for consumption. I know of houses that have dealt in it in large quantities. The salmon for those few years was entirely satisfactory. The contract in suit refers to swells. A swell is a defective can with gas in it and is noticeable from an exterior inspection. The presence of that gas is attributable to the commencement of decomposition. A rusty tin means presence of rust on the exterior, which would eat away the can and impair its salability, if con-

(Testimony of A. B. Field.)

tinued long enough. In the course of business I received the following letter:

Thereupon was introduced and read in evidence Plaintiff's Exhibit 1, as follows:

**Plaintiff's Exhibit No. 1—Letter, October 18, 1912,
North Alaska Salmon Co. to American Trading
Co.**

San Francisco, Oct. 18, 1912.

American Trading Company,
244 California Street,
San Francisco, Cal.

Gentlemen:

You are advised that the following salmon is now in Mission Rock warehouse:

5000 cases "Archer" Salmon.

1300 cases "Polar King" Salmon.

We trust that you will give us shipping instructions for same in the very near future.

Yours truly,

NORTH ALASKA SALMON COMPANY.

J. P. HALLER,

Manager.

Very shortly after the receipt of the letter of October 18, 1912, I had a conversation with Mr. Haller at the office of the North Alaska Salmon Company respecting this pack; Mr. Haller and myself only were present.

Q. What was that conversation?

Mr. WISE.—If your Honor please, that is objected to upon the ground that it is immaterial, irrelevant and incompetent, that it is not within the

(Testimony of A. B. Field.)

issues, that it seeks to explain a written instrument which is already before the Court.

The COURT.—What is the purpose of it?

Mr. KNIGHT.—The purpose of it is to show the representations which were made which are set out in the complaint, the furnishing of the samples, the representations made by Mr. Haller concerning the condition of these goods, as to what they were, what the plaintiff could rely upon, as the reason why there was no actual inspection made of them. That is all set out in the complaint in the two counts, one as bearing on [40] the question of estoppel and one as bearing on the question of the right of the plaintiff to recover the purchase price under the circumstances.

The COURT.—I will let the evidence go in.

A. I asked for samples to be sent to my office as usual of this canned salmon both Polar King and Archer Brand.

Q. Were samples afterwards of each of these cans of salmon sent to you? A. Yes.

Q. Was anything further said in that conversation which you had, where you have given us the substance of that conversation?

A. He said he found the quality superior to anything.

Q. I ask you: Did anything further occur in that conversation between yourself and Mr. Haller than the request for samples? A. Yes.

Q. State what further occurred; what was the further conversation?

(Testimony of A. B. Field.)

A. He made the statement that the quality of the Archer Brand and the Polar King were superior to anything he had ever packed, or ever presented to us, and that we should obtain full prices for the same.

Mr. KNIGHT.—Q. Mr. Field, was there anything further said with respect to the quality of these salmon of the 1912 pack other than what you have said?

A. Not to my knowledge; not that I remember.

The American Trading Company handled the 1911 pack of Archer Brand salmon purchased from the North Alaska Salmon Company. We received the samples of this 1912 pack, first [41] an entire case, 4 dozen cans. We afterward got other samples, not less than two cases. I made an examination of those samples prior to the time the salmon was paid for. I opened not less than a dozen tins; the condition of the contents was very satisfactory and perfectly edible. Some of these samples furnished by the North Alaska Salmon Company were sent east by the American Trading Company to eastern brokers. I don't know who selected the samples that were sent by plaintiff. They were not selected by it. No one but myself conducted any negotiations or had any part in this transaction on plaintiff's behalf. When I spoke of the defendant furnishing samples as usual, I meant as they had in previous years, the salmon in previous years. They always furnished samples in buying this salmon. No inspection was made by plaintiff of the bulk of this salmon as distinguished from the samples prior to the time of delivery. I made no investigation of the

(Testimony of A. B. Field.)

condition of the salmon before taking delivery and paying for it other than the investigation I made from the samples that were furnished and other than the information that was given to me by Mr. Haller. I would not have taken the salmon if the samples had proved to be in whole or in part inedible, or if Mr. Haller had not made the representations that he did respecting its condition.

The condition of canned salmon cannot ordinarily be ascertained from the external appearance of the can, other than is shown by swelling or other like defect, and it is necessary to open the can in order to know the condition of its contents. They are hermetically sealed. Delivery of the Archer Brand salmon was taken by the American Trading Company [42] from the North Alaska Salmon Company very shortly after November 4, 1912.

I sent the following letter on plaintiff's behalf to defendant November 4, 1912:

Thereupon was introduced in evidence Plaintiff's Exhibit 2, as follows:

**Plaintiff's Exhibit No. 2—Letter, November 4, 1912,
American Trading Co. to North Alaska Salmon
Co.**

Nov. 4, 1912.

North Alaska Salmon Co.,
#110 Market Street,
San Francisco, Calif.

Gentlemen:

Referring to our Contracts for ARCHER Salmon. Please overhaul very carefully; remove all swells;

(Testimony of A. B. Field.)

shipping 1000 cases by Santa Fe in the name of A. B. Field & Co. to their order, St. Louis, Mo., marking same: Diamond M St. Louis; Ship 900 cases by Santa Fe, C. M. & St. P. Delivery Chicago; Ship in our name to order, notify ourselves; mark the same Diamond F Chicago. We must ask you to be extremely careful in removing all swells as there has been great difficulty in moving this Salmon this year.

Now we are negotiating for sale of further quantities which we hope to hand you shipping instructions by the time you have shipped out the above.

Very truly yours,

AMERICAN TRADING CO.

(PACIFIC COAST.)

WITNESS.—(Continuing.) I sent the samples of this salmon that were furnished by the defendant to eastern places, at least a dozen cans to Louisville, to Fulton Gordon, the leading merchandise broker of that city, and at least a dozen to Walter A. Frost & Company, Chicago, a leading merchandise broker of that city. Of the salmon delivered by defendant plaintiff shipped and sold 900 cases to Walter A. Frost & Company, of Chicago, 1,000 cases to the Merchants National Grocery Company of St. Louis, 1,000 cases to the Louisville Grocery Company, of Louisville, Kentucky. The remaining 2,100 cases remained in the Mission Rock Warehouse where plaintiff took delivery of the salmon. Subsequent to the early part of November, 1912, complaints regarding the condition of the salmon were made by Eastern buyers.

(Testimony of A. B. Field.)

Mr. KNIGHT.—Q. When did you first receive those complaints; when did they first reach you?

A. The end of November and the first of December.

Q. Of what year—1912? A. Yes.

WITNESS.—(Continuing.) The first complaint was received December 3, 1912. In December, 1912, after receiving these complaints I had a conversation with Mr. Haller in the [43] office of the North Alaska Salmon Company. The substance of the conversation was to the effect that we were receiving a great many complaints from the shipment of this Archer salmon in eastern cities where we had shipped salmon. I asked Mr. Haller that we would expect him to investigate the matter very thoroughly and reimburse us for any loss that we sustained, and that these eastern buyers claimed that the deliveries were nothing like the samples sent to the buyers. Mr. Haller positively declined to consider any claim whatever.

In February or March, 1913, I examined the 2,100 cases at Mission Rock Warehouse. I first made a preliminary examination accompanied by C. R. Morse and Paul Hartman, a professional overhauler of canned salmon, opening say perhaps 50 cases and removing 50 cans selected at random. We found a great many cans the contents of which was rotten. I am able to state that something like 25% were rotten. I made a later examination with Mr. Morse and Mr. Hartman in March, 1913. We made com-

(Testimony of A. B. Field.)

plete notes of that. These notes are dated April 30, 1913.

Mr. WISE.—Q. I understood you to say a moment ago that this second inspection made by yourself, Mr. Morse and Mr. Hartman was made in March, 1913.

A. I said about, along about that time, about that time.

The COURT.—Isn't it dated?

Mr. WISE.—This is dated, but the examination was at a different time. I observe that this document or these notes are dated April 30, 1913. With that date in your mind as appearing upon these notes, will you indicate to us how long before this date this examination was made? [44]

A. I would say in the neighborhood of two months. We were a long time doing it. It took a great deal of time. On this examination we opened 417 tins. The result showed over 30 per cent contained rotten fish. We avoided swells and rusty tins. The 2,100 cases in the warehouse here were destroyed by the Government. That was the subject of the condemnation suit in this court entitled United States vs. 2,100 Cases of Canned Salmon. Plaintiff had done nothing with it on account of its rotten condition. We did not attempt to put it on the market or offer it for sale. We didn't consider it merchantable. Salmon properly processed will keep indefinitely. I have known cans of salmon seven years old to be cut open and in perfect condition; as long as the air is kept from the contents it will keep indefinitely. That is true of do-over properly prepared. There

(Testimony of A. B. Field.)

is no difference in this between a do-over and prime salmon.

The COURT.—Q. Mr. Field, what is the distinction, then, in the trade, that induces the price for so-called do-over salmon to be less on the market than prime salmon, that is, I mean that which—

Mr. WISE.—They call it standard or No. 1, I think.

The COURT.—Standard or No. 1.

A. There is a possibility that it might not be altogether properly canned and at times it will blow off.

Q. That is always subject to be discovered from external appearance if it generates gas?

A. It may be a defect in the can, weakness or rust.

Q. What I want to get at is, does it not make some difference in that grade of salmon, as between that and No. 1 or standard, as to the time within which it should be put on the market and [45] consumed?

A. Not if it is properly prepared. The tin shows additional marks where it has been tampered with, and it is placed as a second grade; it shows punctures.

Q. A sort of *caveat emptor* to the purchaser; he wants to look out?

A. That is the idea; it may not have that keeping property; if it is not guaranteed against swell, a man has to buy it for a less price, so as to be prepared for that if necessary.

Q. It is recognized as being subject to being found with swells. A. Later on.

(In response to question by a juror.) In 1912

(Testimony of A. B. Field.)

standard Alaska Reds opened at \$1.40 per dozen and we sold this Archer brand for \$1.00.

Mr. KNIGHT.—Have you anything that refreshes your memory as to different kinds of salmon?

A. This is the annual notice; it is a trades paper that gives for a series of years the opening price.

Q. Will you state what those prices were for the different kinds of salmon?

The COURT.—We are only concerned with standard and with the Archer brand.

A. In 1912, Alaska Reds opened for \$1.40.

Q. That is standard?

A. Yes, do-overs are not quoted here.

The COURT.—Q. What did you pay for these do-overs? A. 85¢.

Q. What would you have been called upon to pay under a similar contract for primes? [46]

A. \$1.40 less commission.

Q. What is that commission?

A. \$1.40 less brokerage and so forth.

Q. I am asking what it would net you?

A. \$1.40 less 2½ per cent.

Q. They would not have contract for less than \$1.40 less 2½ per cent? A. Not in advance.

Q. We are trying to ascertain what the difference is between the standards and do-overs.

A. This particular year, 1912, the standard was \$1.40 less commission; we will say that it was \$1.35 taking the commission off because we pay the net price; we paid 85¢ in advance that year, and that was

(Testimony of A. B. Field.)

a matter of speculation, making a fixed price the year before.

Q. You do contract ahead for standards?

A. But subject to an opening price it shall not be over so much.

WITNESS.—(Continuing.) Now, for instance, this year we anticipate an opening price of about \$1.40 to open at \$1.50; it is now at \$1.60. It all depends entirely on what the pack may be. In November, when that contract was made, it was all guess work all round, so to speak, entirely a gamble what the price would be; in other words, it was a speculative purchase.

Q. Assuming that you had included in this contract 5,000 cases of standard or prime Reds, what would you have had to pay for them under the contract, as compared with 85 cents a dozen for the do-overs?

A. \$1.50, in comparison; the price that year opened lower than [47] we anticipated, for the reason that there was a very large pack that year. In 1912 the pack was over one million cases in excess of what had ever been packed. The 1912 pack was the largest we ever had.

Q. Mr. Field, what was the market value of the do-overs in 1912, at the time of the delivery of this lot of merchandise, if it had conformed to the pack of 1911 do-overs in condition, as a matter of condition, that is, if it was fit for consumption?

Mr. WISE.—That is objected to, if your Honor

(Testimony of A. B. Field.)

please, as immaterial, irrelevant and incompetent.

Mr. KNIGHT.—We have asked in our fourth count for damages arising from an estoppel of the defendant to assert that we did not inspect them; we have a statement of damage in our fourth count. We have alleged that we have been damaged in the sum of \$17,000. That was one thing that counsel was complaining about. We ask for damages in the fourth count and ask for the return of the specific sum of money that we paid, in our second count. If the jury should find, for instance, that there has been a breach here of the contract in the respect that we have set out in our complaint, that is, that it did not conform to the 1911 pack, and we were entitled to a salmon that did, then I take it that the court could instruct the jury that they could find according to the evidence as to the difference between the market value of the stuff that should have been delivered at the time of its delivery and the value of the merchandise that actually was delivered under the contract.

A. \$1 per dozen.

Q. Mr. Field, what was the value at the time of the delivery of this Archer brand of salmon, in 1912?
[48]

Mr. KNIGHT.—Q. Did the salmon that was delivered to you in 1912, Archer Brand Salmon, in view of the condition in which it was discovered, have any market value at all? A. No value.

Cross-examination.

There are different grades of Alaska salmon;

(Testimony of A. B. Field.)

Alaska Reds, Alaska King and Alaska Cohos. Alaska do-overs are in the class of Cohos or medium red, as to value.

Q. Now, as a matter of fact, Mr. Field, the label does not indicate the grade or quality of the salmon?

A. It should.

Q. I ask you whether it does, as a matter of fact?

A. It does in the matter of the Archer Brand; yes.

Q. A label is the personal property of the trader or dealer in canned salmon, isn't it?

A. At times; yes.

Q. A salmon of a given general quality, packed for a trader, is packed with such label as the trader uses or owns? A. Yes, sir.

Q. For example, in the controversy here there is some reference made to Polar King. That is another brand of salmon? A. Yes.

WITNESS.—(Continuing.) We agreed to pay 85¢ for these do-over salmon per dozen according to the opening price. The best grade of salmon from Alaska, red salmon, opened at \$1.40 per dozen in 1912. The same salmon is used in do-over cans as is used in the best grade of salmon.

Mr. WISE.—The packer seeks to put up first grade salmon all the way through?

A. Yes. [49]

Q. Now, in the process of putting it up, if a tin should be defective, or if there should be gas generated in a tin, that tin is set aside and it is reprocessed at the cannery? A. Yes.

The COURT.—Right there, Mr. Field, it might

(Testimony of A. B. Field.)

result and doubtless does result frequently in the processing of fish, that the same fish has been divided up into six or a dozen cans and a part of these cans may have to be done over and the other be prime.

A. That is true.

Q. Therefore, the only defect is the defect of tinning it or canning it? A. The processing; yes.

Q. If there is a leak, for example, in a can, and that leak is soldered, that can is called a do-over, isn't it? A. Yes.

Q. Or if there is air in a can and that is discovered at the time of the processing, that can is opened, or a hole bored into it, the gas or air is permitted to escape, and that is called a do-over?

A. After it is re-processed and retorted.

Q. Other than the defect in the can, or in the canning of the best grade of fish, there is no difference, then, between the commodity itself, the best grade of the commodity, and the do-over grade?

A. Provided it is mended right then and there.

Q. I say except for the process of closing the tin or canning the merchandise properly, there is no difference between the best grade of salmon and the salmon which you call do-overs?

A. If it is re-processed properly. [50]

Q. I said if it is re-processed properly, if it is tinned properly, if it is mended properly.

A. Yes.

Q. There is no difference between the grades of salmon of the best class and of the do-over class?

A. That is right.

(Testimony of A. B. Field.)

WITNESS.—There is not a sufficient quantity of do-overs for market quotations.

Mr. WISE.—Is it not also due to the fact that a great number of reputable merchants and dealers refuse to have anything to do with do-over salmon?

A. Not at the dates mentioned, 1911 and 1912.

Mr. WISE.—Q. Isn't it a fact, Mr. Field, that they cannot use do-over salmon now at all, because they are not allowed to use those old cans?

A. That is the case now, yes.

Q. There is no such thing nowadays as do-over salmon, is there? A. No.

WITNESS.—In October, 1911, when we contracted for this salmon at 85¢ a dozen, the market price was \$1.25 for do-overs.

Q. And in the intervening year, the market for do-over salmon had gone down, hadn't it?

A. With the rest of the market, it all went down together.

Q. That was due to the extraordinarily large pack of 1912? A. Yes.

Q. As a matter of fact, the market for canned salmon in October, November and December, 1912, was very much lower than it had been the year previous? [51] A. Yes.

Q. Now, you said something about not being able to place all the do-overs, didn't you?

A. I did.

Q. What was that due to—the depressed condition of the market?

(Testimony of A. B. Field.)

A. Not the depressed condition of Cohos, but the depressed condition of other grades of salmon which we were selling against.

Q. Did you have any trouble disposing of those in the preceding years? A. No.

Q. Due to what, due to the market condition of salmon? A. No, because the quality was good.

Q. You knew nothing about the quality of the goods, you say when you sold them?

A. 1912, we had no trouble selling them as long as the quality was good; it was a matter of quality.

Q. When did you contract for the sale of 2,900 cases of this salmon in 1912?

A. Previous to November 18th.

Q. When did you first discover, if you did at all, that the pack of 1912 was an inferior pack as to quality?

A. After receiving complaints from these eastern customers.

The COURT.—What time was that?

A. In the course of 30 days, in the natural course of events, when that salmon arrived at destination.

WITNESS.—The first shipment of this Archer Brand salmon east was made November 15, 1912. It was about the 10th of December, 1912, that I first learned of the condition of [52] the salmon that went to St. Louis.

Q. You know that Mr. Haller has been dead since the spring of 1915? A. Yes.

Q. Is there any other way of testing the quality of

(Testimony of A. B. Field.)

salmon in a can except by opening each can and looking at it? A. Not to my knowledge.

On October 18, 1912, I received plaintiff's exhibit one, advising me that 5,000 cases of Archer Brand salmon were in the Mission Rock warehouse and asking me for shipping instructions. The conversation that I had with Mr. Haller occurred some time in October.

I only remember the substance of my conversation with Mr. Haller in asking him to send samples. If I remember rightly I asked him for one case to be sent to my office; he sent one case; I received another case a couple of weeks or so later. Of the first case I probably opened a dozen cans; I do not remember exactly; I do not remember exactly what I did with it. Of the remainder I sent samples to Louisville, St. Louis and Chicago. On October 21, 1912, I sent F. Gordon, Louisville, samples of this Archer Brand salmon. On November 6, I sent Fulton Gordon, Louisville, a package of canned salmon. On November 8, I sent Walter Frost of Chicago two packages. Those are the only samples I sent to anybody during the year 1912.

Mr. KNIGHT.—Q. Were the two shipments to Louisville and the one shipment to Frost?

A. There is another one on November 29th. A sample went out to J. W. Crawford, Roanoke, Va.; I do not remember about it. [53]

Q. Did you send any others?

A. On November 1, I sent to L. K. Eck at Texarkana.

(Testimony of A. B. Field.)

Q. How long after you got the first case of samples did you get the second case?

A. I should imagine a couple of weeks or so.

Q. Who asked for that? A. I did.

Q. Those samples were for what purpose?

A. Representing the salmon that they were to give me, the Archer salmon they were to deliver me.

Q. To be used by you for the purpose of issuing samples of resale?

A. Yes, they were asked for that purpose.

Q. In other words, in your business when you called on Mr. Haller to discuss the 1912 pack and your business with him, you asked him to send some samples, so that you might send them to your different customers, in order for you to re-sell them?

A. Correct.

Q. Your business was to re-sell this salmon through jobbers?

A. We bought it on speculation.

Q. Speculation to re-sell it through different jobbers in different eastern communities? A. Yes.

Q. And these samples that you asked for were for that purpose? A. Yes.

The COURT.—Then these samples were furnished, really, from the lots that you had bought; they just sent you a case?

A. I don't know anything about that; they were represented [54] as such.

Q. You say that you told him to send you these samples to send to your customers? A. Yes.

(Testimony of A. B. Field.)

Q. And they were from the lot of salmon that you had bought? A. That was my belief, yes.

Mr. KNIGHT.—We contend that they were not; he accepted the goods as samples, but they probably were not.

Mr. WISE.—Let us get that clear. What do you mean, is your belief—what Mr. Knight just stated or what you had previously stated?

A. I believed that they represented this salmon I was to receive on this contract that I had with the North Alaska Salmon Company, that that was a representative sample.

Q. Now you say that you asked for these samples to be sent on to your customers. At whose expense were the samples thus furnished sent?

A. Pardon me. I asked for samples to be sent to my office.

Q. But you asked for them to be sent to your office for the purpose, you say, of sending them to your customers? A. At our expense.

Q. They were sent at your expense?

A. The American Trading Co.

Q. In other words, you paid for those samples?

A. The expressage; yes, there was no charge for the samples.

Q. For instance, here is what I want to get at, Mr. Field. You bought 5,000 cases? A. Yes.

Q. You contracted for 5,000 cases? A. Yes.

[55]

Q. Of do-overs? A. Yes.

Q. And you got them? A. Yes.

(Testimony of A. B. Field.)

Q. Did you get 5,002 cases? A. No.

Q. You got just 5,000, including your samples?

A. Plus two cases.

Q. That is what I am asking you, because that is very material. A. Plus two cases.

Q. Plus two cases? A. Yes.

Q. Do you know that as a fact? A. I do, yes.

The COURT.—You indicated this morning in your direct examination that do-overs can always be known from primes because they bear evidence of having been pricked or punctured.

A. Yes, as a rule they can be known.

Q. Were these samples that you received from the defendant here do-overs?

A. I did not pay any particular attention to them at that time.

Q. You have dealt with them a great many years?

A. They might have been other samples; he might have given me standard samples, for all I remember now.

Q. Mr. Field, would you want the jury to understand that you could be deceived that way by samples?

A. It might possibly have been something better.

Q. I am asking you for the fact. [56]

A. I hope not.

There was nothing to enable me to determine whether these were samples from the 1912 pack or something prior, except Mr. Haller's word, Mr. Haller's assurance, that it was the finest lot of salmon he ever packed.

(Testimony of A. B. Field.)

Q. Now, Mr. Field, being an experienced man in the trade, you could not have foisted upon you samples of a previous year for samples of the present year, could you?

A. You can't tell the difference. The man don't live that can tell it.

Q. The time that would elapse between the pack of one year and another, that time would afford an opportunity for labels to become discolored which could not occur within so short a period as one or two months; isn't that true? A. Sure.

Q. What I am trying to get at is you have no idea that these samples were not sent to you from the pack of 1912? A. No.

Mr. WISE.—Q. You say in answer to his Honor's inquiry that at that time, namely, the fall of 1912, you had no idea that the samples sent to you were other than that year's pack? A. Yes.

Q. I am asking you whether any investigation you made or whether any evidence at your command, or whether any information has been brought to you from any source whatsoever that the samples sent you at your request were other than samples of the 1912 do-over pack?

A. I have no reason to think so, no.

I stated also at that first interview Mr. Haller [57] stated do-overs were better than any he ever had. I don't remember whether Mr. Haller was in Alaska in 1912. I think his superintendents had reported to him the condition of the pack.

(Testimony of A. B. Field.)

Q. Then that had reference to the quality of salmon that was put into a tin? A. Yes.

I don't remember any letter from Mr. Haller accompanying the samples. Referring to the packages of samples which I sent east, I know of my own knowledge that none of them contained less than six nor more than twelve tins. We went back to the old system of handling samples; that was a matter of custom. We have always handled them by samples. In selling this salmon to the trade we always represent it as do-overs or seconds, never any other way. The man who purchases them from the retailer does not know they are seconds. Fulton Gordon of Louisville and Frost & Co. of Chicago were the agents of plaintiff in disposing of the salmon of the 1912 pack.

Plaintiff contracted directly with the Louisville Grocery Company on November 6, 1912 for some of this salmon. The samples from which the sale of Archer Brand Salmon was made to Louisville Grocery Company in 1912 was sent to Fulton Gordon. We also sold part of this salmon to Merchants National Wholesale Grocery Company at St. Louis through Fulton Gordon, our broker.

I have no memorandum showing sales of do-over salmon prior to 1909.

In the year 1909 plaintiff sold all of the do-over salmon purchased by it from defendant prior to November 4. [58] In 1910 all of the salmon purchased by plaintiff from defendant was disposed of by November 30. In 1911 they were all sold before they arrived; they were sold to arrive July 15, subject

(Testimony of A. B. Field.)

to safe arrival. From my records I can state that the first complaint we received in 1912 was on December 3.

I made the first examination of the salmon in the Mission Rock warehouse in the spring of 1913. After the preliminary examination was completed and we found a large percentage of the salmon decomposed, we talked the matter over in our office and then commenced a more detailed examination.

Q. During the period of time that do-over salmon was a commodity that was dealt in by your firm before the date of these so-called sanitary cans, state how many dealers, in proportion to the total number of dealers in canned salmon, refused to deal in any do-overs? A. I would not be able to state.

Q. Do you know of any who ever refused?

A. Not to my knowledge, none of them refused.

In the fall of 1911 when the contract for the purchase of the 1912 pack of Archer Brand Salmon was made, the opening price for No. 1 Red Alaska Salmon was \$1.60 a dozen.

When there is a large pack of standard or No. 1 salmon, the market for do-overs drops proportionately to the quantity of No. 1 salmon.

Plaintiff dealt in the do-overs purchased from defendant upon a speculative basis. There is no fixed market quotation on do-overs. The quantity is small in comparison with the size of the pack.

That a great many dealers in canned salmon have no opportunity to traffic in do-overs. [59]

(Testimony of A. B. Field.)

At the time I made the contract for the 1912 pack of Archer Brand salmon do-overs at 85¢ a dozen, the market price for No. 1 Red. Alaska Salmon was \$1.60 per dozen. The same salmon was used in both No. 1 and do-overs.

Q. If the contents of the tin are properly reprocessed and all swells and rusty tins removed, if the contents of the tins are identical and the difference is only in the fact that one tin has been properly processed and the other has not, will you please explain to the Court and the jury the real reason for this great difference in the price of these tins?

A. My purchase in 1911 of the 1912 pack was a speculative purchase.

Q. A speculative purchase based upon what?

A. What the future price may be, what the pack may be. As a rule the price which is made for future salmon is that the buyers have the privilege of accepting or rejecting the opening price.

When plaintiff purchased Polar King brand of salmon from the defendant in the fall of 1911 of the pack of 1912, a definite price was fixed for this brand.

The COURT.—Q. If No. 1 Alaska salmon and do-overs are exactly the same material and the do-overs are just as good as that which is classed as prime, why should there be such a great disparity in the price between the two.

A. The custom has made it so.

Q. But Mr. Field, custom has always some basis or reason.

(Testimony of A. B. Field.)

A. But the trade regulates what they will pay, supply and demand.

Q. That is always based upon a reason, a very good reason, and men experienced in the trade have knowledge of it? [60]

A. I can't explain it except on supply and demand.

Mr. WISE.—May we understand that that is the best answer you are able to give, to account for the disparity in the price?

A. Supply and demand, yes.

Redirect Examination.

Do-over salmon was dealt in by the largest wholesale groceries in the United States.

The original purpose of my obtaining the samples of salmon from defendant under this contract was to satisfy myself of the quality of the goods we were to receive of the 1912 pack. In 1909 we sold 5,350 cases Archer brand do-over; in 1910, 6096 cases, and in 1911, 3,000 cases Archer brand do-over salmon.

Recross-examination.

Q. What is the best grade of Red Alaska Salmon?

A. Standard.

Q. What is the next best? A. Prime.

Q. What is the next best? A. Seconds.

Q. That means a do-over? A. Yes.

Q. Polar King is not a standard, is it?

A. It is a prime.

In the contract for the purchase of Polar King salmon it is designated as No. 2 grade Red Alaska salmon.

(Testimony of A. B. Field.)

Q. What is the difference between standard and prime?

A. The prime has been recooked but not filled with salt water. [61] When a leak develops in a can during the original processing and the oil or juices leak out, the can is filled with salt water. In the case of a prime, the oil from the salmon has not leaked out of the can.

Testimony of Frank D. Merrill, for Plaintiff.

FRANK D. MERRILL, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a chemist employed in the United States Food and Drug Inspection Service in San Francisco. I have been a chemist about ten years and I have been connected with the government service since November, 1906. I examined 100 tins of salmon involved in the case of United States vs. 2,100 Cases of Archer brand salmon in July, 1913. I found 39 per cent of the tins examined to contain salmon that was unfit for human consumption. The outward condition of the tins which I examined appeared to be in good condition. I did not examine any swells. I could not tell from the outside of the tins what was the condition of the contents.

Mr. WISE.—We will concede that Mr. Merrill is a chemist of standing, that his ten years in the United States Government makes him a chemist of ability and of standing.

WITNESS.—(Continuing.) I made an organoleptic test of the salmon, i. e., by the five senses. It

(Testimony of Frank D. Merrill.)

was not submitted to any chemical analysis. It was self evident when the tins were opened what the condition of the contents was. The 39 per cent [62] of the salmon was in various stages of decomposition, some of it very putrid; and in some cases it was sour, sour smell and in others, it might be termed as very stale, a condition such that it would be unfit for food. The examination was made in July, 1913. I have examined canned foods more or less, as a part of my duty, during the entire period of my service with the Government. If food is properly canned and kept in proper condition as to temperature, it will keep for a number of years.

The COURT.—The manner in which they are kept has a great deal to do with their preservation.

A. Yes. For example, if they were in a fire or submitted to high heat of any kind they would be liable to blow up and swell in one way or another; if they became wet they might rust.

Mr. KNIGHT.—Q. Are you able to state, Mr. Merrill, how long salmon if properly cooked and canned will last if kept in an ordinary temperature and not subject to extreme heat?

A. They will keep a number of years; no particular limit of time. I think the 39 per cent of the salmon which I found inedible was in that condition at the time it was last processed. I think it was then in the same condition that it was when I opened the tins. My opinion is that the salmon was processed in the condition that it was that I found it in as to the question of decomposition. I mean that in the case of

(Testimony of Frank D. Merrill.)

the tins which were decomposed when opened, they were decomposed when they were processed, that they were processed in that condition. Decomposition does not progress after sterilization in hermetically sealed cans. That entirely stops decomposition at that point. Sterilization does not remove smell. If it is in a hermetically sealed tin the smell stays right there. The point I am trying to make is this: that if a fish [63] is rotten, or is in the process of rotting when put in the tin and the tin is sterilized, that then decomposition stops at that point, that is, your finished product is in exactly the same condition as to decomposition that it was when it was last processed. Now, of course, processing makes a difference physically in the texture. You cook that fish and there is a physical difference there, but speaking from the standpoint of decomposition, the condition as to decomposition is exactly the same after processing as it was before, because decomposition stops. The decomposition is caused by bacterial growth and they are killed by the processing, that is, if it is completely sterilized; if it is not completely sterilized and decomposition does continue, then you have got a swelled tin. I am speaking of these tins, none of which were swelled.

The examination of the salmon was made in the laboratory of the Food and Drug Inspection service in San Francisco. I first saw this salmon in the laboratory.

Cross-examination.

These samples, i. e., 4 cases of 48 tins each, were

(Testimony of Frank D. Merrill.)

brought into the laboratory and bore the name of the inspector H. C. Moore. These tins were selected from each of the four cases which were brought into the laboratory. My recollection is that no swells or rusty tins were selected. I do not know of my own knowledge where these cases came from. 100 were opened and 92 held in reserve. That can of salmon marked Plaintiff's Exhibit 3 for identification bears the same label as the sample that I examined.

(The witness refers to a can of salmon bearing the [64] label Archer Brand, marked Plaintiff's Exhibit 3 for identification.)

Testimony of H. C. Moore, for Plaintiff.

H. C. MOORE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am and was in 1913 regularly appointed Food and Drug Inspector of the United States Department of Agriculture. I obtained samples of the canned salmon in controversy from Mission Rock warehouse bearing the identical label like Plaintiff's Exhibit 3 for identification; the samples were collected July 2, 1913. 192 cans were taken, one can of each lot in 192 cases picked at random from the pile of cases where were there, and I took them personally to my office in the Appraisers' Building where they were marked with my initials and seal. I turned them over to the laboratory and they are receipted for there and put into a locker until the examination is made. I did not take any cans which gave evidence of swells or cans which gave any out-

(Testimony of H. C. Moore.)

ward indication that their contents were not in good condition, or where rust had made any holes.

Cross-examination.

Q. Did you ever investigate the subject to ascertain what was the condition of the Archer Brand salmon seized by you when it left Alaska?

A. No. The only thing that I did was to try to find out if any one knew but so far as I myself was concerned I had no means of finding that out. [65]

A report was rendered by the chief of the Western District to the chief of the Bureau of Chemistry at Washington in which the former stated that he was unable to give any evidence that these goods were in bad condition when they were shipped from Alaska. This statement was based upon my investigation and report.

Testimony of John S. Hume, for Plaintiff.

JOHN S. HUME, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a salmon canner and have been such since 1896, actively since 1906. Have operated canneries on the Rogue River and in Alaska; I operated a cannery in Southeastern Alaska in 1912 at Nakat Inlet. A can of do-over salmon is a can that is a defective can of salmon made sound by mending and re-processing, re-cooking.

Q. You say it is a defective can of salmon. Will you state whether the defect is in the can or in the salmon itself? A. In the tin.

There are two systems in canning salmon, one

(Testimony of John S. Hume.)

where the old style cans were used, such as these in the present cases; there are two systems in the old style of canning.

A vacuum in the cans is obtained under one system by an exhaust box and under the other system by two cookings. Salmon is canned as follows: Salmon is stripped, cut up, put into the can. It is then passed through an exhaust box, [66] with the vent open in order to expel the air. It is then sealed, i. e., the vent hole is closed, and the can is put into a retort and cooked for eighty minutes. Unless some defect in the can is discovered, that completes the cooking. If a leak is discovered before the cans go into the retort, and are immediately mended, they go in with the same lot of salmon and are straight goods; but if the leaks are found after they come out of the retort, they are classed as do-overs. If the end of a can was not expanded, swelled out, when you take it out of the retort, it would denote a leak. All perfect cans are swelled out after coming out of the retort, while they are hot from the steam in the can; there is pressure on the can. Sometimes they have a hot leak tester, and he takes a mallet and hits the top of every can to see whether the can will collapse by the striking of the mallet, and if the can collapses thereby it leaks. When the can is cold the leaks are found by hitting the top of the can with an awl, by the sound.

When the cans with the swelled ends are taken from the retort, they are put in a lye bath to take the grease off and cleaned, then rinsed off in another

(Testimony of John S. Hume.)

tank, then put on the floor of the cannery in iron trays or coolers. They still have the bulging ends until they are cooled off. When they cool the end collapses. If there was not a sufficient amount of vacuum in the can it would not collapse. This is put aside and used as a do-over. Any leak is a do-over after the can has been cooked. To discover a leak the can is put in a testing tank of hot water and the can shows bubbles wherever it leaks. The point of the leak is marked with an awl. The can is then set aside with others to be re-cooked. [67] What is done depends on the amount of work that is necessary to be done in the cannery, how much fish there are on hand; if there are a great many fish the can is set aside; ordinarily if there is not much fish in the cannery the can is taken to the mender's bench and it is then re-mended and re-cooked. The expulsion of air from the can depends on the system you use; if you use the exhaust box, the can is run through the exhaust box. The vent is opened first, the leak mended and after the can is mended with the vent open, it is re-run through the exhaust box and then the hole is stopped, then re-cooked. When you have not an exhaust box, using the old style cans, it is called the two cooking process. In this process the salmon is first cooked under pressure—the retort is used for the same purpose as the exhaust box—the exhaust box system does not cook under pressure—it is open at either end, the retort is closed. The can is sealed in the retort, in the first cooking, and when it comes out of the first cook, in order

(Testimony of John S. Hume.)

to get the vacuum the can is vented, then re-cooked in the same manner. The heat in the can expels the air; the cooking of the salmon serves the same purpose as the exhaust box. And with the exhaust box the salmon is cooked about eighty minutes at about 242 degrees temperature. Without the exhaust box, under the two cooking system, you ordinarily cook the can half an hour in the first cooking and about an hour in the second cooking. Between the two cookings the cans are ordinarily examined to determine if they have leaks. There is a hot leak testing after the first cooking. If the cans collapse after the first cooking, it denotes a leak and if the can is a heavy weight leak it is called a hot leak and it is mended then and there and put [68] in with the second cooking. After the second cooking with the old style cans some defective tins will ordinarily be discovered, they are do-overs. A heavy weight leak means that all of the juices of the salmon which have been cooked out of the meat have not leaked out of the can, but a considerable portion still remains in the can; enough to give it a substantial weight. A hot leak and a heavy weight leak are identical. If it is a dry can it is treated as a do-over; salt water is sometimes put into dry cans to take the place of the juices of the fish which have leaked out. The time within which a defective can must be re-processed after the leak is discovered depends entirely upon the size of the leak. If the leak were large enough the fish might decompose within three or four days; if it were very small it might not decompose

(Testimony of John S. Hume.)

within three or four months. A so-called sanitary can is now used. There are no do-overs to such extent with the new or sanitary cans. They require no venting and the tops are not soldered on but are fastened by machinery. They first came into use, I think, in 1908, coming gradually into general use. All fish canned from the same variety of salmon would be of the same grade and quality. In do-over salmon there are different grades; we have do-overs of the Alaska reds, and do-overs of Alaska pink salmon and of other varieties of fish that are being canned that season. We have do-overs of the different grades of fish—red Alaska salmon is the highest grade of Alaska salmon. There is no difference in the keeping qualities between a salmon originally processed and a do-over of the same grade properly processed.

Q. Mr. Hume, will a can of do-over salmon, properly processed [69] and hermetically sealed, ever swell?

A. Not if it has sufficient vacuum.

Mr. KNIGHT.—Q. What can you state, Mr. Hume, as to the edibility of do-over salmon if properly re-processed and properly canned?

Mr. WISE.—There is no debate on that subject between us, Mr. Knight.

Mr. KNIGHT.—I think not.

Cross-examination.

I have never been in Northern Alaska, where the defendant's canneries are located. I do not know what system is used by them. A small percentage of

(Testimony of John S. Hume.)

swells are discovered long after the can is put up. Swells do occur long after the can is put out, either because of a small leak, which cannot be detected in the processing, or insufficient vacuum in the can when it was processed. If it has not four inches of vacuum in it when processed it may deteriorate at any time thereafter. A large parcel of salmon will develop a very small proportion of swells over a period of years; there may be such a defect in the can and so indiscernible that it might require months before the result of the defect will be followed by decomposition. That is also true of the lack of vacuum in a can; it may require several months before that defect, whichever of the two it may be, results in the decomposition of that product, or the fish itself.

The COURT.—Q. Mr. Hume, it is a fact, I believe, demonstrated by practical experience in the canning process of salmon, that no matter what degree of care is used in the process at a cannery that there always will be found in due [70] course of time a certain percentage of spoiled salmon, in any factory; is that not true? A. That is a fact.

Q. I suppose that would necessarily bear upon that, but it is a fact demonstrated by experience that any processing, no matter how careful, does not prevent eventually the development in a pack of salmon of a certain percentage of bad salmon?

A. There is no pack that is 100 per cent perfect. In practice do-overs have a larger percentage of spoiled cans than the best grade of salmon.

(Testimony of John S. Hume.)

A heavy weight do-over is one in which the defect in the can is discovered after the first cooking. It is sold in a class by itself. From what I have heard in this courtroom with regard to the brand known as Polar King I would suppose it to be a do-over.

Redirect Examination.

Mr. KNIGHT.—Q. Give us the highest percentage that you know of salmon that has developed swells over a period of years if properly processed, and excluding the salmon in controversy.

A. I could not say.

Mr. KNIGHT.—Q. Can't you state whether it is one-half per cent of 5 per cent, or any percentage? My original question was to get your experience, so that the jury might get some idea of the relative percentage of tins that did swell, but only after the passage of several years.

A. One per cent would be excessive. [71]

Testimony of C. R. Morse, for Plaintiff.

C. R. MORSE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am secretary of the American Trading Company and have been such about 13 years. Cans containing salmon marked Archer Brand were sent to the office of the American Trading Company in 1912 shortly prior to the time the American Trading Company paid for that salmon. I think probably if I said a week prior I would be close to it. A number of the cans were opened at different times in my presence before the plaintiff made payment for the salmon.

(Testimony of C. R. Morse.)

The samples were opened shortly after they were received. The condition of the contents was entirely satisfactory for that kind of salmon. The contents were all good from an edible standpoint. It has always been the practice of prior dealings between the plaintiff and defendant for defendant to furnish samples of Archer Brand salmon sold to plaintiff prior to payment. Customarily these samples were furnished as soon as the salmon arrived and was available. Payments were made customarily by the plaintiff to defendant after the examination. I should say we examined about a dozen of cans of samples. The tins were opened in my presence by Mr. Field. I tasted every tin and found it edible. By my statement that the samples were satisfactory for that kind of fish I meant that do-over salmon has not the same amount of oil that standard has; a little is lost in the re-cooking; it does not present quite the appearance of the high-grade salmon; it has not quite the richness of taste.

The bulk of the salmon, as distinguished from the [72] samples, was not examined by plaintiff prior to the time payment was made. I made an examination of the salmon subsequent to the time of making payment for it in company with Mr. Field and Mr. Paul Hartman at the Mission Rock warehouse, in San Francisco. There were two examinations. The preliminary examination showed about 25 per cent inedible. We took a tin out of each 100 cases. In that examination we did not take any tins that showed any exterior evidence of damage to the con-

(Testimony of C. R. Morse.)

tents. The second examination was made almost immediately thereafter. Almost immediately after we completed the preliminary examination we started the second examination; I think it was the next day. It was completed April 30, 1913, and consumed two or three weeks. We pulled down every fifth case in the entire pile of 2,100 cases and took one tin out of each, excluding all that appeared swelled or otherwise defective. The result of that examination showed 30.2 per cent inedible; there were 417 tins examined; 126 tins were inedible. It was an organoleptic test by the senses of smell and sight.

Cross-examination.

The only date which the records I have before me, with reference to the examination which I have testified to, shows that the second examination was completed on April 30th, 1913. The examination took, I should judge, about three weeks. I am certain it was completed on April 30th. We devoted several hours a day to this examination. The statement that the samples of the 1912 pack furnished by defendant were examined by me prior to the payment for the shipment of Archer Brand salmon is made entirely from my recollection. [73] I made no memorandum of the date. I have discussed the matter with Mr. Field and Mr. Knight. There was nothing to impress the circumstances of the examination of these samples upon my mind except they were the last do-overs we handled. At the time I examined them I did not know this fact. Plaintiff

(Testimony of C. R. Morse.)

handled forty or fifty thousand cases of salmon of all kinds during the year 1912. I never examined any other tins in the office than those samples furnished by defendant and samples of the Polar King salmon furnished under the same contract. The other business was handled in quite a different way; salmon that we buy in Vancouver and Seattle we pay an inspector to examine; he issues a certificate and that is satisfactory to us. I could not say from whom else we bought salmon in the fall of 1912 except the defendant. With the exception of the salmon purchased from the North Alaska Salmon Company, I made no examination of any other purchased from 1909 to 1916.

The COURT.—Mr. Morse, did you testify, or was it Mr. Field, that samples were always furnished you on these purchases?

A. I think Mr. Field testified to that.

Q. Was that a fact? A. It is.

Q. Now, samples were never sent to you until after the arrival of the fish in San Francisco, were they?

A. No, but it might be sent to us before we were notified that the bulk of the salmon was available in the warehouse.

Q. But here Mr. Field testifies that he requested these samples to be sent him after he got this letter. How do you construe that; if it was the uniform habit to send samples to [74] you after the arrival of the fish, why was it necessary for Mr. Field to specially request that samples of the shipment be sent to him?

(Testimony of C. R. Morse.)

A. I don't know that he made any special request.

Q. Don't quibble with me; answer my question; he says that he made a special request. Now, why would he do that, if it was the uniform habit to send samples; that is what I am asking you.

A. I don't know.

During the year 1912 plaintiff sent a case of forty-eight tins of Archer brand salmon to the American Trading Company's agency in Manila; this case was sent directly from the Mission Rock Warehouse to the Steamship Company. It was never examined in the San Francisco office; I do not find that any report was ever made upon this salmon. I have no record of any complaint. Having in mind that the salmon was paid for on November 18, 1912, I am of the opinion that the examination which was made of the samples by me took place about a week prior to that time. As I remember it, the samples in the office were opened a few tins at a time covering several days; I would say that it took approximately a week to examine those tins. There is no reason that I know of why the examination should not have been completed in one day. [75]

Testimony of C. O. S. Gallant, for Plaintiff.

C. O. S. GALLANT, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a laboratory helper in the United States Food and Drug Inspection laboratory, Department of Agriculture; my office is at room 53, Appraisers' Building, San Francisco. I occupied the same position in the spring of 1913. I assisted Mr. Moore in

(Testimony of C. O. S. Gallant.)

getting samples of Archer Brand salmon in Mission Rock warehouse about the 2d of July, 1913. We took 192 cans, one from each case, here and there; we brought them down, put them in a launch, and had an expressman bring them to the office. They were in Mr. Moore's charge, and later we sent 48 cans out of the 192 to the Seattle laboratory of the United States Government. The outside appearance of the tins we selected was good. I sent them to Seattle on the 26th day of December, 1913, and personally attended to the shipment. There was an artificial heat at the Mission Rock warehouse where the salmon in question was stored, and no heat at all in the storeroom at the U. S. laboratory in San Francisco where the 192 tins of samples were kept by me until examined there or sent to Seattle.

Testimony of Roy W. Hilts, for Plaintiff.

ROY W. HILTS, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Q. What experience have you had in salmon canneries?

A. I spent about a month around Puget Sound inspecting salmon [76] canneries and making certain experiments in them to get certain information we desired.

I examined Archer Brand salmon in the Seattle laboratory of the Department of Agriculture in January and April, 1914. It came from the San Francisco food inspection laboratory by express. I examined 48 cans and found that 38 of these cans were evidently do-overs. As to the balance, I could not

(Testimony of Roy W. Hilts.)

find any evidence of their being do-overs. I opened the cans and examined them. I found 16 were actually spoiled, 12 cans were more or less soft and stale, showing incipient decomposition, 15 cans were what I would call as passable and 5 of the tins were good. There were one swell and one leak among the bad tins. The leaky cans did not have a vacuum, the others did. Other than those two cans there was no external indication of damage.

The COURT.—Do I understand you to say that 12 cans gave evidence of beginning to deteriorate?

A. Yes, they were spoiled. The can were kept in a storeroom while in Seattle, which was generally very chilly.

Previous to my being in the Government service I was with Armour & Co. for 3 years, who operate large canneries, and assisted in the investigation of some problems connected with the canning of meats. In 1913, under the instructions of the chief of our bureau, I made a trip to a number of salmon canneries on Puget Sound, observing the methods and making tests of the pack, getting certain information we wished. In my official capacity I have had occasion to examine samples of canned salmon as they were submitted in the routine of business covering about seven years. I examined possibly [77] 10 or 12 samples a year. The 48 cans were examined at Seattle by taste and smell. No chemical analysis of the salmon was made. I compared these 48 cans with samples of standard salmon which I had on hand. I have never been in Alaska. I do not

(Testimony of Roy W. Hilts.)

know how the salmon in controversy was packed, except by conversation with men who have worked in the Alaskan canneries; I do not know what method is used in handling the salmon—in shipping it from Alaska to San Francisco.

Q. How in your opinion was the swell condition of this salmon produced?

A. I think it was caused by spoilage before the tins were last sealed and sterilized.

Q. Can you state a little more particularly what you mean by that?

A. I mean that it would have been impossible for those cans to have obtained their condition and not to have swelled unless the spoilage had occurred previous to the last sterilization and sealing of the cans.

There was one swell that must have become swelled through the process of decomposition that was going on in the can, with the action of the bacteria that were causing decomposition. All the spoiled ones wouldn't swell because some of them had been sterilized after they spoiled, thereby killing the bacteria and preventing the further evolution of gas and thereby the can retained its vacuum which it had at the time it was put into it. The cans that were not swelled contained material that was originally spoiled when the cans were finally re-processed; decomposition was not proceeding any further, but decomposition was proceeding in the tin that was [78] swelled and producing a gas. As to the 12 cans showing incipient decomposition, what I meant

(Testimony of Roy W. Hilts.)

was that their odor was not clean and sweet, and that the meat in the can had undergone incipient decomposition at some stage in its history; it must have occurred before they were last sealed and sterilized because they were not swelled.

Cross-examination.

I found one leaky tin among those that I examined. The cause of a leak developing a year and a half after the salmon is packed is due sometimes to a bit of scale between the solder and the body of the can and the softening of the solder might remove the scale and permit the air to enter the can or if the cans were stored in a very damp place, the tin might rust through the outside and produce a leak. Such a can would not swell. Frankly, I cannot tell when the swell or leak developed.

Q. Did you ever know of a swell developing in salmon a year and a half after it was packed, of your own knowledge?

A. Not of my own knowledge, no.

When I said that 15 of the remaining 46 cans were passable, I meant that they were good enough to eat. I would not have condemned salmon like that. As to the 12 cans showing incipient decomposition had begun when they were last sterilized, but it had been checked by the sterilization and had not progressed since sterilization. As to the 16 cans that were bad, they had been permitted to spoil before the last processing was done. The cans designated as passable were good enough to eat. If cans of salmon to be re-processed were permitted to stand a few days in the

(Testimony of Roy W. Hilts.)

cannery before such re-cooking or re-processing, they would get into the condition [79] in which I found these spoiled cans.

I remember that a number of these cans which I examined showed rust on the exterior. I cannot tell the exact number. I judge it could not have been a preponderating number or I would have used different language in my memorandum. The rust comes from an atmospheric moisture. If the rust is permitted to go to such an extent that the tin has corroded through and the can leaks and air gets into the can and bacteria find entrance, then the food will spoil. If all the bacteria are not killed in the cooking process, decomposition might develop, even in a hermetically sealed can.

Q. In other words, bacteria in a hermetically sealed can will develop long after the process of closing the tin has been completed?

A. Sometimes that will occur. Sometimes after the closing has been done, but that is usually within a very reasonable time that the swell occurs, if it is in a moderately warm place. By reasonable time, I mean within a few months of the time that the canning takes place, if it is taken into a warm atmosphere.

The COURT.—Decomposition can take place in a hermetically sealed vessel, can it? A. Yes.

Q. In other words, the hermetically sealing from the air does not prevent the process of decomposition if the seeds of it are in the container at the time it is sealed?

(Testimony of Roy W. Hilts.)

A. There are many sorts of bacteria than can develop under these conditions—yes.

The bacteria which are in the fish at the time it [80] is canned are presumed to be killed by the application of heat in the cooking process.

A. After the proper degree of heat has been used for the required period of time and the food stuff is then put into a tin and hermetically sealed, if that degree of heat did not kill the bacteria, the decomposition will develop later on—the bacteria will develop and result in decomposition later on?

A. In the course of time.

Testimony of Benjamin R. Hart, for Plaintiff.

BENJAMIN R. HART, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am chief of the western division of the United States Bureau of Chemistry, in the Department of Agriculture, embracing that part of the United States west of Denver; I was appointed in December, 1913, coming to San Francisco direct from the city of Washington. I am a chemist. I have made a complete study of almost all canning that is done in the country, that is, the different varieties of stuff. I have been in the department about twelve years and have worked in a good many different states and made a good many different canning tests. I have made a study of canning by going into the canneries and had goods canned under normal conditions as they usually can them, and sometimes I have changed canning methods and studied the results. Spoilage

(Testimony of Benjamin R. Hart.)

in canned salmon is generally due to three things: The [81] goods were either in bad condition at the time they were canned, or they were either in good condition and were improperly processed and canned, or they were in good condition and might have been properly canned and then some accident to the cans afterwards caused the air to get into them, admitting bacteria and other contaminating elements. When I spoke of improper cooking or improper processing, I had reference to the sterilization of the product. If the product is sterilized properly and the can still has a vacuum in it and has no hole in it, and if the goods inside of the can under those conditions are bad, it is evident that it was bad at the time of the last sterilization; it must be so.

Cross-examination.

The Government has not prohibited the commercial use of do-over salmon. Do-overs are used today but to a very limited extent compared to what it used to be on account of the use of sanitary cans. There is quite a little bit yet that is do-overs. Do-over salmon has never been a suspicious commodity to the Food and Drug Inspector; it never has been to me. I think that if a do-over is properly prepared and handled right, there is no reason why the food value is not as good as any other salmon, and it will keep just as well as a standard tin. A do-over is not caused by any trouble in the meat itself or any inferior article in the meat itself—it is merely an accident in the canning. The reason a do-over is considered a secondary grade is because it has been

(Testimony of Benjamin R. Hart.)

allowed to stay around too long. I know that do-overs are sometimes regarded with suspicion, because we know this do-over salmon is sometimes bad.
[82]

Q. Will you say that the desire to eliminate do-overs altogether from the market contributed very considerably to the introduction of the sanitary can?

A. I should say that, yes.

That has happened a great many times and that is what has given the do-over its bad name. Salmon soup is composed of the heads of salmon boiled for the purpose of supplying additional salmon oil to do-overs. On the other hand, the price in the handling of the sanitary can and the ease with which it is sealed up and the doing away of the hand soldering, has had as much to do with it as anything else; and aside from that they can now lacquer the inside of the cans in such a manner that when the top is put on the fish and the contents of the can do not touch the tin in any place. The sanitary can is the greatest improvement ever put into the canning industry. It began to come into use in 1912.

Redirect Examination.

The sanitary can has another advantage in its appearance. Machinery prepares the can for use.
[83]

Deposition of H. F. Swift, for Plaintiff.

Thereupon plaintiff read in evidence the deposition of H. F. SWIFT, who testified as follows:

I am and have been since 1894 engaged in the busi-

(Deposition of H. F. Swift.)

ness of canning salmon. I was superintendent of a cannery in 1899 and until 1912, and then I built and operated a cannery of my own.

The operation of canning salmon with the old style can is as follows: Fish come from the fishermen taken on the dock; from there they are, either by hand or by machinery, cleaned; from there they go to what is known as the fish cutter, a set of revolving knives, that cut them into four inch pieces, the size of the salmon can; from there to the filling machines, which fill the can with salmon by machinery automatically; from the filling machines they are discharged on to a table where any light cans—that is, cans that are not entirely filled with fish—are filled up with small pieces of salmon to make the weight. Some canneries use a weighing machine; most of them simply gauge it by hand. From there they go through a wiping machine, or a steam wiper, that washes the grease off of them; from that into a soldering machine, which solders on the top. Then they roll down a long rollway, which cools off the solder that has been put on the top, hermetically seal it, and they are taken and put into iron trays or coolers. The hole or vent that is in the top of the can is then sealed with a soldering iron. Next they are immersed in warm water so that any leaks that may be in the can will be detected by discharge of air through the water producing little bubbles of air. Such leak cans are taken out and immediately mended by men [84] who are stationed there for that purpose, and are put back into the coolers, and from

(Deposition of H. F. Swift.)

there they are put into retorts, cooked usually 30 minutes at a temperature of 212 degrees. The retorts are then opened and the salmon is put on a table in the coolers and the processors go over the salmon with a little mallet, striking them on the end first. If there is a leak can, the ends collapse when they are tapped with this mallet, the ends having been puffed out by the pressure generated by the heating during the cooking. If the salmon can does not leak, the end will stay expanded. If the can comes through that retort without being puffed out at the ends, that indicates that there is a leak, and that the heat and expansion has developed the leak sufficiently to expel the air. The cans are then struck by a little mallet with a pin point in the end of it, which punctures another hole in the can; that lets both ends collapse again; then they are immediately re-soldered. This opening that has just been punctured in there has been re-soldered. Then they are put into the retort again and cooked, usually at a temperature of 240 degrees for one hour. From there, after the cooking, they are taken out and the coolers containing the salmon are spread out upon the floor space reserved for that purpose and allowed to cool, usually until the next day; then they are tested by sound with a small striking iron for that purpose, and when leaks are found there, are taken out and put to one side until time can be found to mend them again. After that they are piled up in the warehouse, one can on top of another, piled away closely until time can be found to label them

(Deposition of H. F. Swift.)

and fix them up. I should say after they come out of the retort the second cooking, they go through what is called [85] the lye bath; that is, hot water and lye to clean the salmon cans off thoroughly and scrubbed. Before the cans leave the factory they are shallacked. If a leak develops it is set aside to be re-processed. To do this they are mended and put through a retort again, cooked usually for half an hour, and then they are brought out, and they go through the same process again; if the leak cans are mended immediately they are not usually called a do-over; they are practically the same as good salmon. As the term is used in the salmon trade, a do-over is one that has been re-processed twice or more—set aside to be re-cooked. After a leak is discovered I would not leave a can myself for three days. Anything in my pack that has been over three days standing as a leak I would not put in as good salmon. If a leak has been developed and the leak is not mended, say, within three days before being re-cooked, the salmon would undoubtedly commence to deteriorate. A great deal would depend on the size of the leak. If a very infinitesimal leak the salmon might be practically edible for a week or ten days, but if the leak were of any size at all, it would deteriorate very rapidly and become inedible; and if it had become inedible, there would be no possible way of making it good. There is no way of telling by external appearance of the cans whether the contents are edible or not.

Up to and including 1912 do-over salmon was a

(Deposition of H. F. Swift.)

common article in the market, sold as edible salmon. A good can of do-over salmon will keep indefinitely, by actual experience ten years. If a can of do-over salmon was found in a bad state of decomposition when the can was opened, say a year after it was packed, I would say that it was in that condition when [86] the can was mended and hermetically sealed, must have been decomposed at that time; it would not decompose any more after it was sterilized, by cooking and hermetically sealed.

Cross-examination

Q. You class as No. 1 salmon all salmon reprocessed on the same day?

A. All salmon re-processed on the same day is No. 1 salmon; no possible change in the condition at all. When salmon comes out of the retort and you find a leak in it which is mended immediately, there is no difference in that salmon and the other can alongside of it.

I have never been at the canneries in Northern Alaska. My canning experience has been altogether in Southeastern Alaska.

The use of sanitary cans and difficulty of mending leaks in them virtually put do-overs out of existence. A do-over I consider an inferior grade of salmon; sold as second-grade salmon by the brokers for the reason that a length of time has elapsed and there must be some deterioration in it, not a first-class article; probably a great part of the fat from the fish has escaped by the leaks, dried, or hasn't got the fat in it to show up good when it is opened; in fact, it is

(Deposition of H. F. Swift.)

an inferior grade of food. It might be perfectly edible and harmless, provided the can had not been leaking long enough to sour or deteriorate. A great part of do-overs are simply light cans filled with salt water which would not affect the quality of the meat particularly; it wouldn't look good when it was opened, no oil or fat on the juice. I think I would be safe in saying that probably one-third of what are [87] sold as do-overs are simply light cans filled with salt water; might not be leak cans at all. Where there are leak cans there is a certain amount of deterioration in the fish itself.

Mr. KNIGHT.—I now offer in evidence the judgment-roll in the case of United States of America vs. 2,100 Cases of Canned Salmon heretofore pending and determined in the District Court of the United States in and for the Northern District of California. This is the salmon referred to by the witnesses as having been in the Mission Rock warehouse.

Mr. WISE.—I object on the ground that it is incompetent, irrelevant and immaterial; that this defendant was not a party to that proceeding.

The COURT.—Objection sustained.

Mr. KNIGHT.—I will reserve an exception.

The COURT.—Allowed.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 1.

Said judgment-roll is in words and figures following, to wit:

**Judgment-Roll—United States of America vs.
Twenty-one Hundred Cases Salmon.**

*In the District Court of the United States, in and
for the Northern District of California, Northern
Division.*

UNITED STATES OF AMERICA,

Libelant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,
Defendant.

To the Honorable Court Above Named:

The United States of America, through Benjamin L. McKinley, United States Attorney for the Northern District of California, respectfully show:

That the libelant above named, in its own right, prays for seizure and condemnation of certain articles which may be [88] used either as a food or as a drug, to wit, Twenty-one Hundred Cases of Salmon;

That the said libelant is informed and believes and therefore alleges that the said twenty-one hundred cases of salmon were shipped by the North Alaska Salmon Company in interstate commerce from the Territory of Alaska to the city and county of San Francisco in the State and Northern District of California, and arrived in the City and County of San Francisco, State and District aforesaid, as follows: A portion on steamer "St. Andrews," September 7th, 1912; a portion on steamer "Oriental," September 18th, 1912; a portion on steamer "Curtis," on Octo-

ber 5th, 1912; a portion on steamer "Olympic," on October 14th, 1912, and the said twenty-one hundred cases of salmon are now in the same condition in which they were shipped from the Territory of Alaska to the city and county of San Francisco, in the State and Northern District of California, and have always remained ever since said shipments in the same condition in which they now are;

That on November 26th, 1912, the said North Alaska Salmon Company sold the said twenty-one hundred cases of salmon to the American Trading Company (Pacific Coast).

That the libelant is informed and believes and upon such information and belief alleges that the fish contained in the said twenty-one hundred cases of salmon is adulterated under the provisions of section 7, paragraph 6, of the act of Congress of June 30th, 1906, known as the Food and Drugs Act, in that the fish contained in the said twenty-one hundred cases of salmon consists in whole or in part of a filthy decomposed or putrid animal or vegetable substance.

That the said twenty-one hundred cases of salmon constituted an interstate shipment from the Territory of Alaska to the city and county of San Francisco, in the State and Northern District of California, in interstate commerce as above [89] set forth, and are now within the jurisdiction of this Honorable Court in the original unbroken cases.

That the source of libelant's information is an official communication by wire received from the Secretary of Agriculture under date of July 11th, 1913, which said communication is hereunto attached by

copy and made a part of this libel and marked Exhibit "A."

WHEREFORE, in consideration of the premises your libelant prays that said articles which may be used either as a food or as a drug, consisting of twenty-one hundred cases of salmon, may be proceeded against and seized for condemnation in accordance with the act of Congress approved June 30th, 1906, and to this end this Honorable Court may issue the process of attachment in due process of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, so far as practicable in this case, and that the said American Trading Company (Pacific Coast) and all other persons, firms and corporations having or pretending to have any right, title or claim in and to said articles which may be used either as a food or as a drug above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid and that if the said American Trading Company (Pacific Coast) cannot be found, it be cited by process of publication in the manner provided by law;

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food and drugs hereinbefore particularly mentioned and described, be condemned at the suit of this libelant according to the provisions of the act of Congress hereinbefore set forth; that this Honorable Court may pass all such orders and decrees and judgment as may be necessary in the premises and may grant your libelant a decree for the costs of this proceeding against the said American Trading Company (Pacific

Coast) or the owners or holders of said [90] articles condemned, should such costs not be satisfied out of the proceeds of the sale, and that your libelant may have such other and further relief as the nature of the case may require.

B. L. McKINLEY,
Attorney for the United States in and for the Northern District of California.

T. H. SELVAGE,
Asst.

EXHIBIT "A."

"Washington, D. C., July 11, 1913.

U. S. Attorney, San Francisco, Calif.

American Trading Co., San Francisco, have in possession twenty-one hundred cases salmon packed and processed by North Alaska Salmon Co. of Alaska and transported from Alaska by their own vessels to San Francisco, sold and delivered to present owner under invoice dated Nov. twenty-six, nineteen twelve. Delivery was made at various times by following boats of Packer. There is nothing to indicate the quantity delivered by each boat but trips were made as follows: "Stamdraws" on Sep. seventh, nineteen twelve. "Oriental" on Sept. eighteenth, nineteen twelve, "Curtis" on October fifth, nineteen twelve, "Olympic" on October fourteenth, nineteen twelve, products now on premises of Mission Rock Warehouse of the Hasslett Warehouse Co., San Francisco. Shipping cases are branded "4 doz talls Archer Brand Salmon—packed for A. B. Field and Co., inc., agents, San Francisco."

Cans are labeled "Archer brand Alaska Salmon—red—A. B. Field and Co., inc., distributors, San Francisco. Official sample analyzed in San Francisco laboratory bureau of chemistry showed that one hundred cans twenty-eight per cent was putrid or sour and that product is a do-over product. Another analysis of official sample in San Francisco laboratory showed thirty-nine per cent putrid or sour. Laboratory also reports that the owner examined four hundred seventeen cans and admitted that thirty-two per cent was sour or putrid in being putrid and decomposed in the amount of twenty-eight to thirty-nine per cent product is adulterated in violation of food and drugs act, paragraph [91] six, section seven, under food. Consignment subject seizure and confiscation under section ten. Department recommends immediate seizure goods can be identified by A. B. Field, employee of American Trading Co. Evidence adulteration furnished by H. J. Holland and F. D. Merrill of San Francisco laboratory; evidence sale and interstate delivery furnished by inspector H. C. Moore, please wire action taken.

D. F. HOUSTON,

Secy."

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

H. C. Moore, being first duly sworn, deposes and says:

That he is a Food and Drug Inspector of the Bu-

reau of Chemistry, United States Department of Agriculture, San Francisco, California; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

H. C. MOORE.

Subscribed and sworn to before me this 12 day of July, 1913.

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jul. 12, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court, in and for the Northern District of California, First Division.

No. 15,436.

UNITED STATES OF AMERICA,
Libellant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,
Defendant.

**Stipulation Extending Time of Claimant to Except,
etc., to Libel.**

It is hereby stipulated and agreed that the American [92] Trading Company (Pacific Coast), claimant herein, may have ten (10) days from the

104 *American Trading Company (Pacific Coast)*

date hereof within which to except, move or plead to the libel on file herein.

BENJ M. L. McKINLEY,

United States Attorney.

Dated San Francisco, Aug. 11, 1913.

In the District Court of the United States, in and for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Libellant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,

Defendant.

Answer.

To the Honorable The District Court Above Named:

The answer of American Trading Company (Pacific Coast), claimant, to the libel herein, respectfully sets forth as follows:

I.

Claimant admits that all of the allegations of of the libel herein are true, except as hereinafter particularly set forth.

II.

Claimant denies that all of the fish contained in the twenty-one hundred cases of salmon referred to in the libel herein as adulterated within the meaning of section 7, paragraph 6 of the act of Congress of June 30, 1906, known as the Food and Drugs Act, but in this behalf claimant alleges the fact to be that some of said salmon, as hereinafter more particularly

set forth, is not so adulterated, and is not filthy, decomposed or putrid animal or vegetable substance, or is not any portion of an animal unfit for food, whether manufactured or not, or is [93] not the product of a diseased animal, or one that has died otherwise than by slaughter, but is fit for consumption. In this respect claimant further alleges the fact to be that heretofore, and of the purpose of determining the fitness of said salmon for consumption, and after its importation into this port, as set forth in the libel herein, claimant selected one tin out of each of one hundred cases of said salmon as a sample, no one of which tins was rusty, swelled, or otherwise indicated any defect. As the result of such examination it was ascertained that the contents of 25% of such tins so selected as aforesaid were sour, rotten and putrid, and a considerable quantity of the contents of others of said tins so selected was also not fit for consumption. Thereafter, a further examination of the salmon in controversy was made by claimant by selecting therefrom out of every five cases of the entire lot one tin which was neither rusty, swelled, or in any way indicated defective condition. Of these tins 126 out of 417 or 30.2% were found to be sour, rotten and putrid, and a further considerable quantity was also found to be unfit for consumption, and the total amount of salmon so found fit for consumption as the result of said examinations was approximately 65 to 70% of the samples so selected.

Claimant further alleges that a considerable quantity of the tins containing the salmon referred to in the libel herein, the exact quantity whereof is un-

known, is rusty, swelled or discolored, and thus indicate that the contents thereof are not fit for consumption.

WHEREFORE, claimant prays the judgment of this Court as to the condition and quality of said salmon, and each and every part thereof, and whether or not the same is liable for condemnation and sale, and for such other and further relief in the premises as it may be entitled to.

SAMUEL KNIGHT,

Attorney for Claimant. [94]

United States of America,
State and Northern District of California,
City and County of San Francisco.—ss.

L. A. Ward, being first duly sworn, deposes and says:

That he is an officer, to wit, the manager of American Trading Company (Pacific Coast), a corporation, claimant herein, and makes this affidavit of verification on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are therein stated on information or belief, and as to those matters he believes it to be true.

L. A. WARD.

Subscribed and sworn to before me this 13th day of August, 1913.

[Seal]

A. J. NAGLE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed. [95]

Monition.

NORTHERN DISTRICT OF CALIFORNIA.—ss.
The President of the United States of America, to
the Marshal of the United States for the
[Seal] Northern District of California, GREET-
ING:

Whereas, a libel of information hath been filed in the District Court of the United States, for the Northern District of California, on the 12th day of July, in the year of our Lord one thousand nine hundred and thirteen, by Benj. L. McKinley, Esq., Attorney for the United States for the Northern District of California, in the name and in behalf of the United States of America against twenty-one hundred cases salmon, for the reasons and causes in the said libel of information mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said twenty-one hundred cases salmon may be cited in general and special, to answer the premises, and all proceedings being had that the said twenty-one hundred cases salmon may for the causes in the said libel of information mentioned, be condemned and sold to pay the demands of the United States of America.

You are therefore hereby commanded to attach the said twenty-one hundred cases salmon and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not

be condemned and sold pursuant to the prayer of the said libel of information, that they be and appear before the said court, to be held in and for the Northern District of California, on Tuesday, the 29th, day of July, 1913, at ten o'clock in the forenoon of the same day, if the same day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, [96] then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable WM. C. VAN FLEET, Judge of the said court, at the city and county of San Francisco, in the Northern District of California, this 12th day of July, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-eighth.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

BENJ. L. McKINLEY,
U. S. Attorney.

In obedience to the within Monition, I attached the twenty-one hundred cases salmon (which consisted of twenty-one hundred and 92 cases and 9 cans), salmon described, on the 14th day of July, 1913, and have given due notice to all persons claiming the same that this Court will, on the 29th day of July, 1913 (if that day should be a day of juris-

diction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. I further return that I took the above twenty-one hundred and ninety-two cases and 9 cans of salmon) into my possession at Mission Rock in the bay of San Francisco, at San Francisco, and stored the same in the Haslett Warehouse at Mission Rock, in the bay of San Francisco at San Francisco, Cal., and posted a notice of seizure thereon. I further return that I handed to and left with, P. E. Haslett, Secretary of the Haslett Warehouse Co., a true and correct copy of this monition.

C. T. ELLIOTT,
U. S. Marshal.
J. W. Grover,
Office Deputy.

Dated San Francisco, Cal., July, 14th, 1913.

[Endorsed]: Filed July 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 29th day of July, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WM. M. MORROW, Judge.

#15,436.

UNITED STATES

vs.

2100 CASES OF SALMON.

Minutes of Court—July 29, 1913—Return of U. S. Marshal to Monition.

The United States Marshal having returned the Monition issued herein that “in obedience to the within Monition, I attached the twenty-one hundred cases salmon (which consisted of twenty-one hundred and ninety-two cases and 9 cans salmon), therein described, on the 14th day of July, 1913, and have given due notice to all persons claiming the same that this Court will, on the 92th day of July, 1913 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claims be interposed for the same. I further return that I took the above twenty-one hundred cases salmon (which consisted of twenty-one and ninety-two cases and nine cans of salmon) into my possession at Mission Rock Bay, San Francisco, at San Francisco, and stored the same in the warehouse at Mission Rock in the bay of San Francisco, at San Francisco, Cal., and posted a notice of seizure thereon.

I further return that I handed to and left with P. E. Haslett, Secretary of the Haslett Warehouse Co., a true copy of this Monition.

C. T. ELLIOTT,
U. S. Marshal,
By J. W. Grover,
Office Deputy.

Dated San Francisco, Cal., July 14, 1913.” [98]

On motion of W. E. Hettman, Esqr., Asst. U. S. Atty., proclamation was duly made for all persons claiming any right, title or interest in said cases of salmon to appear and answer the libel herein and on motion for claimant, by the Court ordered that claimant have ten days to appear and plead to said libel.

[Endorsed]: I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above-entitled ———.

Attest my hand and seal of said District Court, this — day of ———, A. D. 191—.

W. B. MALING,
Clerk.

By ————,
Deputy Clerk.

At a stated term of the District Court of the *District Court of the* United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 18th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,436.

UNITED STATES

vs.

TWENTY-ONE HUNDRED CASES OF SALMON.

**Minutes of Court — September 18, 1913 — Order
Directing Entry of Decree of Condemnation,
etc.**

This cause this day came on for hearing, W. E. Hettman, Esqr., Asst. U. S. Atty., appearing for the Government, and F. E. Boland, Esqr., appearing for the respondent. Mr. Hettman called H. C. Moore, H. J. Holland and Frank D. Merrill, who were each duly sworn and examined as witnesses on behalf of the Government. By the Court ordered that a decree of condemnation and destruction be entered as prayed. [99]

*In the District Court of the United States for the
Northern District of California.*

No. 15,436.

THE UNITED STATES OF AMERICA

vs.

2100 CASES OF SALMON.

The monition in this case having this day been returned duly executed, the usual proclamation was made, and default of all parties not in court having been entered, it is by the Court now here on motion of W. E. Hettman, Esqr., Assistant United States Attorney, ordered, adjudged and decreed, that the following described property, to wit, 2100 cases of salmon mentioned and described in the Libel of Condemnation on file herein, be and the same is for the reasons and causes in said Libel of Condemnation set forth hereby condemned as forfeited to the

United States of America, for the uses and purposes as by statute provided.

Entered this 18th day of September, A. D. 1913.

[Endorsed]: Filed Sept. 18, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Note: Identical copy hereof filed with following endorsement and certificate:

A true copy. Attest:

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN.

I HEREBY CERTIFY AND RETURN that I received the within Writ at San Francisco, Cal., on September 18, 1913, and executed the same on September 19, 20, and 22d, by destroying the within-named salmon by burning the same at the Sanitary Reduction Works in the city and county of San Francisco.

C. T. ELLIOTT,
U. S. Marshal.

By Paul J. Americh,
Office Deputy. [100]

*In the District Court of the United States for the
Northern District of California.*

15,436.

THE UNITED STATES

vs.

2100 CASES OF SALMON.

**Certificate of Clerk U. S. District Court to
Judgment-Roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court,
this 18th day of September, 1913.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed Sept. 18, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk.

Deposition of Walter A. Frost, for Plaintiff.

Thereupon plaintiff read in evidence the deposition of WALTER A. FROST, who testified as follows:

I reside in Chicago, Illinois, and have been engaged in the business of handling canned fish of various kind for 30 years. I have handled Archer Brand do-over salmon 4 or 5 years. I handled some of the 1911 pack of that salmon and found it exceptionally good for that quality of salmon, and perfectly edible, with the exception of a [101] very few cans; it was satisfactory to the people who handled it and to those who consumed it, so far as we know. There are always some cans in do-overs that are not up to the standard. It is customary in

(Deposition of Walter A. Frost.)

our trade for a broker handling do-over salmon to obtain samples of the salmon before handling it to see the quality and note the percentage of possible spoiled cans and general condition of the fish. We received samples of the 1911 pack. We received samples from A. B. Field & Company of the 1912 pack in October or November of that year. We received about two dozen tins, cut them and found them good for do-over fish, fully equal to that of 1911. We thereafter received 900 cases invoiced by A. B. Field & Company at \$1 a dozen tins f. o. b. San Francisco. This shipment arrived towards the end of 1912 at a time when all of the wholesalers allow their stocks to run down and we put it in the warehouse until after the first of the year before putting it on the market. We drew some samples from the consignment. From these samples we cut some samples running as high as 6 out of 10 cans absolutely unfit for food. They were so bad you wouldn't care to stay in the room after they were cut; some of them were absolutely dry and others were very soft. I presume we cut 100 or more cans selected at random from various cases; I would say that the salmon would run at least 35 to 50 per cent absolutely unfit for food. The original examination was made in the latter part of February, 1913, and from that time on we tried to sell to various people. Before March 1st on one occasion I cut 10 cans and found 7 of them bad—unfit for food. April 1st I personally drew 25 samples of the salmon; I found 8 cans that were first-class; 7 that would pass without serious criticism,

(Deposition of Walter A. Frost.)

[102] although 2 of them were very dry, 11 of them bad, 8 of them so bad that when we cut them we had to put them out of the office immediately. They were all of like weight. I took 25 cans out of 25 cases that had not been previously sampled. We tried various buyers in Chicago and went to the houses who made a practice of taking goods a little off grade and selling them to restaurant trade, lunch clubs and such trade as that. After we discovered the condition of the salmon we notified the shippers and to protect ourselves we notified the Health Department of the city of Chicago.

Cross-examination.

We received the consignment some time in November, 1912; it was February when we finally arrived at a sale. We first discovered about 40 per cent of the salmon was unfit for consumption late in February or early in March. We notified the Health Department some time in March, 1914; between February, 1913, and March, 1914, we were making repeated efforts to sell. It was only after we found it was absolutely a hopeless case to sell to anybody under any circumstances that we took it to the Health Department. We expect to find some bad cans of salmon in do-over grades in all lots and in other lots we find very few, sometimes more. It is impossible to state the average number of bad cans that are found in a shipment of do-over salmon. I have seen it run as high as 60 per cent.

The 1911 lot was an exceptionally good lot of salmon, the same as in 1910. I should have said 1911

(Deposition of Walter A. Frost.)

and 1910 ran pretty much alike, perhaps 1911 was still better; the percentage of bad salmon in 1911 was very small, so small it was [103] hardly noticeable. I think the entire claims on the 1911 pack amounted to about 15 cases out of 3,000 to 4,000 cases.

When I say it is the custom to handle salmon of this character by sample, I mean it is the custom all over the country. In 1911 the people who purchased the Archer Brand salmon requested that as long as they were do-overs with the uncertainty of do-overs they wanted a case sent by express in order to sample the lot. The reclamations which I referred to amounting to 50 or 60 dollars on the 1911 pack were made because the buyer was guaranteed against spoils, swells and leaks by the shipper. The 1911 pack was sold in July or August. It was a future sale. I have never actually bought and sold any goods in San Francisco, but I wouldn't do the San Francisco merchants the injustice to think they would buy a do-over salmon without first examining the sample; I would think he was a very poor merchant; he is buying something he knows may be very bad and buying something he knows may be very good. The price that he would pay for it might depend entirely upon the character; naturally he is going to examine it.

In handling do-over salmon the amount of bad tins varies considerably; there is no customary percentage. A man who buys do-over salmon expects to find a certain percentage of spoiled cans. [104]

Deposition of W. W. Armstrong, for Plaintiff.

Plaintiff then read in evidence the deposition of W. W. ARMSTRONG, who testified as follows:

I reside in the city of Chicago, and am and have been since June, 1914, Chief of Bureau Food Inspection of the City of Chicago, State of Illinois. J. J. Costello is and was in May and June, 1914, an inspector of canned goods in that department. In June, 1914, we had occasion to examine samples of Archer Brand salmon. I personally examined 6 cans, the balance were examined by the laboratory. The cans were slightly corroded. There was a bad odor which signified putrefaction. As a result of my observation and analysis of the chemist I ordered the salmon to be condemned as unfit for human consumption. The 6 cans were brought to my attention by Inspector Costello.

Cross-examination.

The goods were in a condition of putrefaction. I condemned the salmon on the ground that it was unfit for food, the cans being corroded and the contents putrefied or showing signs of having been resoldered.

Deposition of James J. Costello, for Plaintiff.

Plaintiff then read in evidence the deposition of JAMES J. COSTELLO, who testified as follows:

I was in May and June, 1914, and have ever since been a resident of Chicago, Illinois, and a food inspector for the Health Department of that city. In April and May, [105] 1914, I had occasion to ex-

(Deposition of James J. Costello.)

amine some Archer Brand salmon through a report from Mr. Frost asking us to examine this certain lot of salmon at Importers' Warehouse. He said they wanted to find out whether they had a right to sell it or not. I went there and took 24 samples, the cans bearing the label Archer Brand salmon. I took them to our laboratory for the chemist to examine. I saw the cans after they were opened and observed a very bad odor which indicated putrefaction, and they looked very soft; it was not only putrefied; some of the goods were so badly corroded that in my estimation it would be unfit for human food. I have had six or seven years' experience in examining canned salmon. There were a great many swells in the lot of salmon at the Importers' Warehouse. In selecting samples for examination we did not take swells as they condemned themselves. As a result of this examination the salmon was condemned and sent to the reduction plant and destroyed. The proportion of samples unfit for consumption in my estimation was about 80 per cent; there was quite a lot of swells.

Deposition of Walter A. Frost, for Plaintiff.

(Resumed).

Plaintiff then read in evidence the further deposition of WALTER A. FROST, who testified as follows:

I remember giving my deposition in this case in San Francisco. I heard Mr. Costello's and Dr. Armstrong's testimony to-day. The salmon they referred to was the same [106] stored by me in Importers' Warehouse received from A. B. Field & Co.,

(Deposition of Walter A. Frost.)

San Francisco, and is the same salmon referred to by me in San Francisco. The salmon was destroyed.

Deposition of Leslie C. Creasey, for Plaintiff.

Plaintiff then read in evidence the deposition of LESLIE C. CREASEY, who testified as follows:

In 1913 my place of business was Louisville, Kentucky, and my business while there and since was organizing wholesale groceries at Louisville, Evansville, Cairo, Indianapolis, Peoria, St. Paul, Davenport and Omaha. The St. Louis house was the Merchants National Grocery Company. I did the buying for these houses.

This sales ticket which you show me refers to 1000 cases No. 1 Tall Red Alaska Archer Brand Salmon purchased from A. B. Field & Company in 1912, and that is my signature.

Mr. BOLAND.—We offer this in evidence.

Mr. WISE.—We object upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. BOLAND.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 2,
and is as follows: [107]

(Deposition of Leslie C. Creasey.)

Louisville, Ky., Nov. 4th, 1912.

SOLD TO THE MERCHANTS NATIONAL
GROCERY CO.,

St. Louis, Mo.

For Account of A. B. Field & Co. San Francisco, Cal.
1000 cs. each Tall Red Alaska ARCHER BRAND
Salmon @ \$1.00 per dozen.

Terms F. O. B. Coast.

Shipping point, less 1½% Cash on arrival of goods
St. Louis, Mo.

Guarantee against swells, and in compliance with the
Food and Drug Act, of June 30th, 1906.

Buyer The Merchants National Grocery.

L. L. CREASEY.

Seller A. B. FIELD & CO.

By A. B. FILED,
Manager. [108]

The sales ticket reads as follows: (Insert same.)

WITNESS.—(Continuing.) The Merchants National Grocery Company received that salmon at St. Louis; most of it was shipped to Louisville, Evansville, Peoria, Cairo and Indianapolis. I saw a few cans of it at Louisville perhaps four weeks after the salmon arrived. The occasion was because the National Grocery Company shipped some out to their retail customers and had complaints. The salmon was spoiled, bad, smelly, looked mushy. I examined about half a dozen cans selected at random and I remember finding just one can good. This salmon was ordered through Fulton Gordon, broker at Louis-

(Deposition of Leslie C. Creasey.)

ville. He represented it as first class No. 1 salmon. I did not notice any swells. The complaints were made because the salmon was bad. I never had any trouble with any do-over salmon; in buying do-over salmon I never had a complaint before.

Q. Are you familiar with the meaning of the term do-overs?

A. I understand from that that it is salmon that—well, I cannot explain.

We bought it for clean, sweet, edible salmon.

Deposition of David R. Hays, for Plaintiff.

Plaintiff then read in evidence the deposition of DAVID R. HAYS, who testified as follows:

I reside in Chicago, Illinois. In November and December, 1913, I was manager of the Merchants Grocery Company, Evansville, Indiana, one of the chain of stores organized [109] by Mr. Creasey. While there we received some Archer Brand salmon from the Merchants National Grocery Company, St. Louis, about 50 cases. I examined the salmon when we had complaints from customers. I made the examination about October 6, 1913. I examined it twice. The first time I must have examined about 20 cans; some were dry; some had an odor that indicated decay. There was more than 75 per cent bad. The second time I cut 41 cans at random; 29 were bad; 7 dry; 5 smelling. None were good.

Cross-examination.

Some of the salmon examined were swells. I supposed that this salmon was first-class quality. I have never purchased any do-over salmon.

Deposition of Wallace Harker, for Plaintiff.

Plaintiff then read in evidence the deposition of WALLACE HARKER, who testified as follows:

In 1912 I resided in St. Louis and was manager of the Merchants National Grocery Company, one of the series of stores established by Mr. Creasey. I remember in 1912 receiving some Archer Brand salmon in November or December shipped by A. B. Field & Company, of San Francisco; a certain amount of it was shipped to other wholesale houses established by Mr. Creasey. Before we took the car we examined cans from perhaps 8 cases; all was good. One can was slightly [110] dry, but good. I did not examine it again until complaints came in, I should think some time in January, 1913; then we found some swells; some that was stinking, some of them broke of themselves. I should say about one-half of the salmon was bad; I do not remember the proportion of swells. Some of it was shipped out to customers. The portion that was not shipped out remained in the house until the United States Government took charge of it. The portion returned by customers was also in bad condition.

Cross-examination.

In the half that I stated was bad I included swells. I do not remember what proportion were swells. Deducting swells a little less than one-half was bad. We also made a further examination of the cases still in our possession and found swells. The cans smelt up the place and several cans burst in the store. I

(Deposition of Wallace Harker.)

should say the second examination was not more than six or eight weeks after the first. The salmon which I have just referred to was supposed to be first class salmon.

Deposition of John E. Dummeyer, for Plaintiff.

Plaintiff then read in evidence the deposition of JOHN E. DUMMEYER, who testified as follows:

In 1912 I resided in St. Louis and was cashier of the Merchants National Grocery Company, of which Mr. Harker was manager. We received a car of Archer Brand salmon [111] from A. B. Field & Company, San Francisco, about the end of that year, 1000 cases. All but 450 or 500 cases were shipped out to the different houses organized by Mr. Creasey. I did not examine it until complaints started to come in, some time in January, 1913. I guess I must have opened at least 3 or 4 dozen cans. It looked mouldy like, some of it, and had a very bad odor to it. My judgment is they were decayed, rotten; I should say about 50 to 66 $\frac{2}{3}$ per cent was bad. We had shipped salmon to a hundred or so customers. There were only about five or at the most ten per cent of the people who did not object, did not send it back. The same proportion of that salmon was not fit to be used.

Mr. BOLAND.—Q. What was done with that salmon which was not shipped out?

A. The salmon which was kept here was condemned by the United States Government. 300 cases were destroyed.

Mr. WISE.—I move to strike out the question and

(Deposition of John E. Dummeyer.)

answer on the ground the same is incompetent, irrelevant and immaterial.

The COURT.—Motion granted.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 3.

Cross-examination.

We paid \$1 a dozen for the salmon less $1\frac{1}{2}$ per cent.

Q. Do you remember how much was paid for that salmon?

A. Yes. I have the invoices here; \$3,940.00. The exchange on the bill was \$3.95, freight \$490 which makes a total of \$4,433.95. [112]

Q. You said that one-half to two-thirds of that which you examined was bad? A. Yes.

Q. Did that include swells or exclude swells?

A. I never opened any of the swells. I just opened up the cans and they were bad. We received a credit of about \$1,350 from plaintiff. Cans that appeared to be good burst open on the shelves in the stock-room; some of them within a month's time, with a very bad odor.

Q. Do you remember whether a circular was sent out to your trade offering this salmon for sale?

A. Yes, I do.

Q. Can you state generally what that circular contained?

A. The circular contained an announcement to the effect that we were about to receive this salmon; that, from the best of the information which we had, it was

(Deposition of Alonzo Boyd.)

a very good grade of salmon and advised them to put in their orders ahead of time.

Deposition of Alonzo Boyd, for Plaintiff.

Plaintiff then read in evidence the deposition of ALONZO BOYD, who testified as follows:

In 1913 I resided in Indianapolis, Indiana, and was Deputy United States Marshal. On April 21, 1913, I executed a monition in a cause entitled "United States of America against Twenty-four Cases, more or less, containing four dozen cans each of salmon, No. 7402," by seizing the twenty-four [113] cases that were marked "Four dozen Talls Archer Brand, Alaska Salmon, packed for A. B. Field & Company, Incorporated, Agents, San Francisco." I then opened some of those cans and the odor was something fierce. I destroyed the salmon by fire Sept. 29, 1913, pursuant to order of Court. Before doing so I opened two of the cans; they were simply rotten. When I started the fire the odor was so bad that it ran everybody out of the dump. There was a horrible stench. There was a bad odor before we began burning them. I took the salmon from the International Grocery Company.

Deposition of Anna De Versy, for Plaintiff.

Plaintiff then read in evidence the deposition of ANNA DE VERSY, who testified as follows:

In December, 1912, and in 1913, I was bookkeeper of the International Wholesale Grocery Company at Indianapolis, Indiana. In December, 1912, that Company received 50 cases Archer Brand sal-

(Deposition of Anna De Versy.)

mon from Merchants National Grocery Company, St. Louis. The International Wholesale Grocery Company of Indianapolis is one of the companies organized by Mr. L. C. Creasey.

In January, 1913, I saw Mr. Jones open a case of that salmon. After complaints had been made about the salmon we opened 6 or 8 cans and found them all bad. We did not send out any more after that. We shipped out probably ten cases to customers and there were a couple of cases returned. The Government seized the balance. [114]

Cross-examination.

I know what a swell is. I don't remember noticing any swells in the cases referred to. When a can was opened and the cold air struck it, it was spoiled and didn't look good. There was a refund for the amount we paid on the salmon. We were paid by plaintiff. I do not know what a do-over salmon is. This salmon came into our possession through the Merchants National Grocery Company of St. Louis, shipped to us at Mr. Creasey's order.

Deposition of N. B. Wigginton, for Plaintiff.

Plaintiff then read in evidence the deposition of N. B. WIGGINTON, who testified as follows:

In November, 1912, I was manager and buyer for Louisville Grocery Company. I signed the sales ticket submitted to me; the sales ticket referred to is as follows: (Not inserted because mislaid.)

The Louisville Grocery Company subsequently received the salmon referred to in that sales ticket

(Deposition of N. B. Wigginton.)

in November, 1912, and I examined the salmon upon its arrival. We found the goods to run very irregularly; some good and some bad; by bad I mean unfit for human consumption; thereupon we instructed plaintiff's broker, Mr. Gordon, that the only basis upon which we would accept the shipment would be to reduce the draft one-half of its face, i.e., \$2,000. The goods were bought to be sound, merchantable fish and to comply [115] with all pure food laws. Subsequently, after continued complaints from customers who had received the salmon, about 250 cases, we examined it; the complaints were as to its quality and condition and came in about ten days after distribution. I examined on the subsequent examination some 50 or 60 cans; the majority of it was rotten, I should say about 90 per cent was rotten. It was subsequently turned over to the City Health authorities. Mr. Montedonico took it from our possession. We got our money back from A. B. Field & Company.

Cross-examination.

Upon arrival from the examination we made of a portion of the shipment possibly 25 per cent was absolutely rotten, others were slightly filled cans and some were all right. Under these conditions we were not required to accept the shipment but out of consideration to the shipper and the agreement to reduce the draft by one-half to give us additional security for the guaranty, we accepted the shipment. We commenced to distribute these goods immediately on their arrival. 219 or 220 cases out of

(Deposition of N. B. Wigginton.)

the 250 cases which we sold were returned to us; about 30 cases remained out. We withdrew the balance from sale. We sell nothing but first class merchantable salmon. We purchased the best grade of salmon from Mr. Gordon. I do not know what do-over salmon is; Mr. Gordon did not tell me that the shipment which we had purchased was do-over salmon. A. B. Field & Co. only refunded us the purchase price on 886 cases. [116]

Deposition of Fulton Gordon, for Plaintiff.

Plaintiff then read in evidence the deposition of FULTON GORDON, who testified as follows:

I remember Mr. Wigginton received some sample cans of salmon from a carload of salmon shipped by plaintiff; I got the samples from the car in which they arrived and brought them to Louisville Grocery Company and cut them before Mr. Wigginton. They didn't cut like the samples which we had received prior and on which we made the sale to the Louisville Grocery Company, these cutting much inferior. A great many of them were bad. We subsequently examined the salmon several times. The Louisville Grocery Company called me over when they had the first lot returned from their customers and complained that they were having them sent back. We got samples from a good many cases which had been returned to Louisville Grocery Company and they cut much worse than the first lot we examined when the car came in. The first examination was made when the car arrived, some time in December, 1912.

(Deposition of Fulton Gordon.)

The second examination, as I remember, was made on the day after Christmas, 1912, or the day after New Year.

Cross-examination.

The original samples which I submitted to Mr. Wigginton were obtained from plaintiff, who had sent them by express to me, and these samples showed good salmon, with the exception of one or two dry cans. I did not know that these were do-overs; nothing was said about their being do-overs. I sold some of this salmon to the Merchants National Grocery Company of St. Louis. I did not sell it as do-over salmon. I sold this salmon both to the Louisville Grocery Company [117] and to the St. Louis firm upon the basis of the samples submitted by A. B. Field & Co. I do not know where these samples were taken from.

Deposition of Dr. Vernon Robbins, for Plaintiff.

Plaintiff then read in evidence the deposition of Dr. VERNON ROBBINS, who testified as follows:

I am city chemist and bacteriologist of Louisville, Kentucky, and was such in December, 1913. I recall at that time making an examination of some Archer Brand canned salmon in my official capacity. Thirty samples were brought in by inspectors Yates and Montedonico. I am also a physician. This salmon was found to be bad; i. e., unfit for human consumption; about 18 out of 20 were unfit for human consumption.

Cross-examination.

There were quite a number of swells among the

(Deposition of Dr. Vernon Robbins.)

cans I examined; 13 were swelling in a pronounced way, and some besides were slightly swollen.

Q. As a physician are you able to say from your examination of this salmon what is the cause of the condition you found? A. Gas formation.

Q. Gas formation in the cans? A. Yes.

Q. What was the cause of the putrefaction?

A. Germ development and bacteria. [118]

Deposition of Dr. Louis Ryans, for Plaintiff.

Plaintiff then read in evidence the deposition of Dr. LOUIS RYANS, who testified as follows:

In September, 1913, I was Deputy United States Marshal of the Western District of Kentucky at Louisville, Kentucky. I destroyed some Archer Brand salmon. On May 26th and May 28th, 1913, I served monition and attachment on National Grocery Company at Louisville and attached 119 cases and 19 extra cans of Archer Brand salmon, appointing Mr. J. B. Fritz, Treasurer of National Grocery Company as custodian thereof. On September 17, 1913, I executed the court's order by destroying 119 cases and 19 extra cans at the city dump in Louisville, which was the same salmon which I had seized. When I destroyed it the condition of the salmon was mighty bad, unfit for human consumption. I opened the cans, cutting them in four different places and throwing them in the dump. The greater part of the salmon was unfit for human consumption. I made no examination of this salmon other than merely to destroy it.

Testimony of Albert Schneider, for Plaintiff.

ALBERT SCHNEIDER, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a teacher and bacteriologist and microanalyst. I am expert in microscopy in the State Food and Drug Laboratory in Berkeley. I have taught bacteriology [119] for 25 years and have had about 25 years' experience in examination of canned food products, including salmon. Assuming that an examination made in July, 1913, of 100 cans of do-over salmon processed in the summer of 1912 showed any percentage of spoilage and the outside of the cans appeared in good condition, that indicates that there was an improper processing, or the use of decomposed material. Improper processing allows decomposition to take place commencing within an hour or two hours after the last processing. Bacteria cannot develop at a high degree of heat. The edible character of the salmon is reduced in direct proportion to the rate of decomposition. Salmon defectively processed, but contained in a hermetically sealed can and at a normal temperature, would become inedible usually within a few days. An organoleptic test will not show the total amount of decomposition. The experience in the laboratory has been that when organoleptic tests reject a certain percentage, when we resort to bacteriological and microscopic methods we get an increase of unfitness for consumption ranging all the way from 25% up to

(Testimony of Albert Schneider.)

100% additional. Frequently in the laboratory we examine canned fish products which give no evidence of decomposition to the senses, but a microscopic and bacteriological examination, nevertheless, discloses an advanced degree of decomposition. I had do-over salmon in mind when I answered. Under ordinary conditions, decomposition sets in immediately, followed by inedibility, as soon as the temperature is sufficiently reduced, and then it proceeds either slowly or rapidly, depending upon temperature conditions largely. If such a can were placed in a warm room, it would decompose [120] in 24 hours, so that it could not be used, or, perhaps in less time; perhaps within 18 hours if the temperature were as it is in this room, for example, fairly warm now—that is, I feel it warm—decomposition sufficiently advances to render it inedible would perhaps require say two or three days, and perhaps in the course of the third day some slight swell would be noticeable. In a pack of salmon largely composed of defectives shipped from a long distance, decomposition would manifest itself by swells, blow-outs, in the course of a few weeks, perhaps a month, depending somewhat upon atmospheric conditions.

Take a can of salmon that has been permitted to stand with some defect which gives access to air and facilities for developing bacteria, and has been permitted to stand until that condition has commenced, and then it is processed under conditions which sterilize it thoroughly, then that would absolutely arrest decomposition. Upon being opened some months

(Testimony of Albert Schneider.)

later it would not prove more offensive to the senses or show any advanced stage of decomposition beyond that which obtained at the time it was last sterilized. On opening cans from a consignment of salmon some months after it had been put up and finding a considerable number offensive to the senses, rotten, that would indicate that the salmon was in that condition when it was last sterilized. Those cans would not indicate any swell whatsoever, in all probability.

Cross-examination.

Canned salmon properly processed will not produce a swell whether there are the seeds of decomposition in it at the time of the first sterilization or not, and if a [121] large number of swells develop after the processing, it indicates that the sterilization was not such as to arrest the decomposition that had set in.

Redirect Examination.

Assume that a shipment of salmon is received in October, 1912, and a sample is examined in Louisville, Kentucky, on the 1st day of November, 1912, and found good, the bulk of the salmon is examined at the same place on the 1st day of December, 1912, and found 50% bad, and that the exterior appearance of the tins is normal, it is evident that the material was decomposed at the time of shipment, irrespective of what may have been the fineness of the samples. If salmon has been hermetically sealed in tins and properly sterilized and found a few months afterwards to be absolutely rotten, then it was in that

(Testimony of Albert Schneider.)

condition when it was sterilized, because decomposition does not proceed after sterilization, but it is still there.

Mr. WISE.—(After identifying the signature to following letter as that of A. B. Field.) I offer in evidence a letter dated November 18, 1910. Said letter is as follows:

Letter, November 18, 1910, A. B. Field & Co. to J. P. Haller, Mgr., North Alaska Salmon Co.

San Francisco, Cal., Nov. 8, 1910.

Mr. J. P. Haller, Manager,
North Alaska Salmon Co.,
San Francisco, Calif.

Dear Sir:

Please ship on the steamer "Bear," sailing the 12th inst. for Portland, Oregon,—San Francisco and Portland Steamship Co.—250 cases of ARCHER salmon to apply on our contract.

Have shipment read, A. B. Field & Co., Shippers—their order, notify Wadhams & Kerr Bros., Portland, Oregon. Please ship only printed ends. Mark Diamond "W" Portland. Place in shipping receipts for insurance purposes, the value of \$1,250.00. Send bill for the same to this office and we will hand you check covering the amount, as per contract.

Yours very truly,

A. B. FIELD & CO.

ABF-MC

By A. B. FIELD.

P. S.—Kindly send to this office one case of Archer Salmon to use as sample at your earliest convenience. [122]

Testimony of Frederick E. Reade, for Plaintiff.

FREDERICK E. READE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am assistant treasurer of plaintiff and have charge of the books of the company. Plaintiff paid to Eastern purchasers in refunds on the Archer Brand salmon purchased under the 1912 contract about \$7,746 in cash.

Cross-examination.

Mr. WISE.—Q. Do you know what made up these figures on what basis these figures were arrived at?

A. These were the actual repayments made by us in cash.

Q. So you have testified, but I mean to say you don't know who calculated these figures?

A. I just paid them out. They were figured up.

Q. All you know about it is, the American Trading Company paid out so much money by way of refund to different customers. A. Yes.

Q. Why or what the claims were, you don't know anything about?

A. I only know in a general way they made these claims and we passed them as correct and I paid them.

Q. But you don't know how they were made up, as to how many—for example, if you paid a man back a thousand dollars, you don't know how much of it went for bad salmon and how much for swells and rusty tins, do you? A. No. [123]

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Three Hundred Cases of Salmon theretofore pending in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Mr. WISE.—I object to the record upon the ground that it is incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 4.

IT IS STIPULATED that in the suit last mentioned the United States libeled said 300 cases of salmon, each of which was labeled as follows:

“Archer 4 doz. Talls Brand

(Design of Indian with bow and arrow)

(Design of fish) Alaska Salmon

Packed for A. B. Field & Co., Inc.,

Agents—San Francisco.

The verified libel, filed May 12, 1913, charges that each of these cases contained four dozen cans of salmon, labeled and branded as follows:

“Archer Brand (Design of Indian with bow and arrow)

Alaska Salmon Red, (Design of Fish)

A. B. Field & Co. Inc., Distributors, San Francisco.”

The libel further charges that these cases and cans and their contents were adulterated in violation of section 7 of the Act of June 30, 1906, known as the Food and Drugs Act and were liable to confiscation because the food product contained in the cans was putrid and decomposed and had an offensive odor; that said fish were known as "do-overs" and were in large part filthy, putrid and decomposed animal product and [124] substance and wholly unfit for food.

The libel further sets forth that these cases and cans and their contents were unlawfully shipped by A. B. Field & Company for sale in interstate commerce from San Francisco, California, to St. Louis, Missouri, and received at the latter place on or about November 30, 1912, and remained unsold and in the original and unbroken packages and in the possession of the Merchants National Grocer Company.

A warrant of arrest for said Salmon and Monition were thereupon duly issued on said 12th day of May, 1913, and return made on the following day by the United States Marshal for said District showing that they were served at St. Louis, Missouri, on the day last mentioned on Wallace Harker, Manager of Merchants National Grocer Company and that the seizure was made of 289 cases of said salmon on the premises of the latter, and further, that due publication was made of the arrest of said property, time assigned for return of said warrant and of the hearing of said cause, which return was accompanied by proof of such publication.

Thereafter, and on June 5, 1913, the date for the hearing, the said Court rendered its decree, in default of appearance by any claimant of the property so seized, finding the jurisdictional facts and further finding therein that "said 289 cases of salmon were on or about the 30th day of November, 1912, unlawfully shipped for sale in interstate commerce by A. B. Field & Company from the City of San Francisco in the State of California, to the City of St. Louis, in the State of Missouri, to said Merchants National Grocer Company, in violation of section 7 of the Act of Congress of June 30, 1906, known as the Food and Drugs Act; that said salmon when so shipped, as aforesaid, was adulterated in violation of said act of Congress and was liable to seizure, confiscation and condemnation as provided in said Act" for the following reasons, to wit: "That the said food product contained in said cases is putrid and decomposed and has a [125] pronounced and offensive bad odor; and that the said fish contained in said cases are known as 'do-overs,' and that the said contents consist wholly or in large part of filthy, putrid and decomposed animal product and substance, and are wholly unfit for use as food."

Condemnation and destruction of said merchandise was thereupon ordered.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States vs. 24 Cases more or less, containing 4 dozen cans each, of salmon theretofore pending in the United States District Court for the District of Indiana.

Mr. WISE.—I object to the record upon the ground that it is incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 5.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled said 24 cases, more or less, containing four dozen cans each of salmon in possession of the International Grocer Company, an Indianapolis corporation.

The verified libel, filed April 19, 1913, charges that each of these cases was labeled and branded as follows:

“4 doz talls Archer Brand

Alaska Salmon, Packed for A. B. Field
& Co., Inc., Agents, San Francisco.”

The libel further charges that the salmon violated the said Pure Food and Drug Act of Congress in that it “consists in part of a filthy, putrid and decomposed animal substance” and had been theretofore transported from Missouri [126] to Indiana in violation of said Act.

Attachment and Monition were thereupon issued and the marshal's return sets forth the seizure of said salmon on April 21, 1913, and publication of the notice of hearing. Thereafter, on June 5, 1913, the date for the hearing, defaults of all interested parties

were taken by order reciting that due process had been issued, and on September 26, 1913, said Court rendered and caused to be entered its decree condemning and ordering destroyed said salmon as adulterated, filthy, putrid and decomposed as aforesaid.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Seventy-five cases of Canned Salmon theretofore pending in the United States District Court for the Western District of Kentucky, at Louisville.

Mr. WISE.—I object to the record upon the ground that it is incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 6.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled 150 cases of canned salmon, described and marked as aforesaid.

The verified libel, filed May 26, 1913, and amended verified libel filed May 27, 1913, set forth that on December 11, 1912, the Merchants National Grocer Company, doing business in St. Louis, Missouri, shipped and consigned therefrom to the National Grocer Company, Inc., doing business at Louisville, Kentucky, said 150 cases of canned salmon and that

75 of those cases remained in said city of Louisville on the premises of said [127] National Grocer Company, Inc., in the original, unbroken packages in which said article of food had been so shipped and transported.

Said libels further set forth that each case of said salmon contained four dozen cans and were liable to confiscation as being adulterated within the meaning of said Food and Drug Act of Congress, for the reason that at the time of their shipment aforesaid, they “were then and there on said date, and have ever since been, and are now, adulterated, in that the contents of each of said cans consist in part of a filthy and decomposed animal substance.”

Thereupon attachment and Monition were duly issued on which the marshal returned that on May 26, 1913, at Louisville, Kentucky, on the premises of the said National Grocer Company he served the process and seized said 75 cases of canned salmon.

The record contains proof of due publication of process and the decree of the Court rendered on September 2, 1913, recites the jurisdictional facts; that no one appeared to claim said property or any part thereof; that the default of all persons was entered; and it was adjudged that the property be condemned as of a deleterious character within the meaning of said Food and Drug Act.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Twenty-eight Cases, more or less, of Archer Brand Salmon theretofore pending in the

United District Court for the Southern District of Illinois, Northern Division.

Mr. WISE.—I object to the record upon the ground that it incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated [128] as

PLAINTIFF'S EXCEPTION No. 7.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled 28 cases, more or less, containing Alaska Salmon, in the possession of United Retail Merchants Grocer Company, of Peoria, Illinois.

The verified libel, filed June 6, 1913, describes the salmon as labeled on each of the cases thereof:

“Archer Brand Salmon

(Design of Indian with bow and arrow shooting at a fish)

Alaska Salmon

Packed for A. B. Field & Co., Inc.,

Agents, San Francisco,”

and that each of the four dozen tins contained in each case was labeled:

“Alaska Salmon Red

A. B. Field & Co., Inc., Distributors,
San Francisco,

Archer Brand

(Design of Indian with bow and arrow).

and sets forth that the food product contained in these cans was adulterated, in violation of said Act of Congress, and liable to condemnation and confiscation for the reason that it consisted in whole or in part of a filthy, decomposed and putrid animal substance and of portions of fish unfit for food.

The libel further sets forth that these cases of salmon, adulterated as aforesaid, had been transported from Merchants National Grocer Company in St. Louis, Missouri, to Peoria, Illinois, on December 12, 1912.

The Monition and Writ of Attachment were thereupon issued, returnable the first Monday in August, 1913, and the marshal's return thereon showed seizure of 35 cases and 79 cans of salmon on the premises of the United Retail Merchants Grocer Company, 918 South Adams Street, Peoria, Illinois, and service of the Monition thereon on the last-mentioned day.

The record shows the due publication of the Monition and on Monday, August 4, 1913, the said Court rendered and caused [129] to be entered its decree reciting the jurisdictional facts that no one has appeared or answered as a claimant; that the 79 cans and 35 cases of Archer Brand salmon, seized as aforesaid, had been transported in interstate commerce and were subject to confiscation and condemnation because the article of food therein contained was unfit to be used as food; and in whole or in part consisted of a filthy, decomposed and putrid animal substance and portions of fish unfit for food, and direct-

ing the destruction of said salmon. [130]

PLAINTIFF RESTS.

Defendant thereupon made a motion for a nonsuit, which was thereupon denied by the Court.

Testimony of Joseph Durney, for Defendant.

After the Court's denial of defendant's motion for a nonsuit, JOSEPH DURNEY, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am an officer of Griffiths-Durney Company, dealers and marketers of canned foods, including fish, and have been for over 25 years in San Francisco. During that time we have handled about half a million of cases of salmon a year. I did know Mr. Field and I know the defendant. I am familiar with do-over salmon. The difference between do-overs and standard salmon is well recognized by traders of canned salmon. There are a certain amount of defective tins in every salmon pack, no matter how careful we are in canning salmon; wholesale grocers know this; a large number of cans will be bad in re-processing or re-cooking, no matter how careful the canner is. The percentage of bad do-overs will run, I should imagine—it is merely memory now—from 5% to nearly 25% that smell bad. The retailer in selling these goods does not permit the consumer [131] to eat them. He advises his customers that a do-over is a cheap grade of salmon and it is being sold at a cheap price and if it is not good will replace it with another can. That fact is well known to the trade and a do-over salmon is known to the

(Testimony of Joseph Durney.)

trade as having a speculative possibility; that is why there is a difference in price. The speculative element in dealing in do-overs is due to the chance that a buyer takes in getting a lot of bad do-overs.

Cross-examination.

I have never dealt in Archer Brand of salmon. I have not handled do-overs for probably four years. Using the sanitary can there is such a small quantity of do-overs it does not pay to re-cook them and fix them up. Prior to 1912 I handled large quantities of do-overs. The extent would depend altogether upon conditions. In a short pack, of course, you have less than in a large pack. We figure in a pack of salmon there would be about 5% do-overs in the old days; consequently, in handling half a million cases we probably had 25,000 cases of do-overs. I do not think we handled any do-overs from the defendant. [132]

Testimony of Crescent P. Hale, for Defendant.

CRESCENT P. HALE, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am and have been general superintendent of the defendant for 16 years. It was my duty to oversee the pack at all the canneries. They were located at Bristol Bay, Alaska. During those years I have been in Alaska during each packing season, including 1912. The salmon was packed under my supervision and direction. There was no different method in 1912 than had been employed in any previous year; the same machinery was used. The condition

(Testimony of Crescent P. Hale.)

of the do-over salmon as to quality in the summer of 1912 was just the same as the 1911 pack. Defendant had four canneries, two large and two small. My headquarters were at the large canneries. I was not there every day, but I was at some cannery every day. I went from cannery to cannery to inspect the work being done in 1912. Do-overs were not permitted to and did not stand more than three days before being re-cooked so far as I know. There was no difference in the degree of care in handling them between that year's pack and the pack of previous years. In the winter of 1912 I heard complaints about this do-over salmon from Field, but not in any previous year. I drew the samples for plaintiff. I took only one can from each case, taken indiscriminately. I did not attempt to pick out any particular cans for sample purposes. The samples from external appearance and weight were the same as the other tins.

Cross-examination.

I and my sister were financially interested in defendant before it sold out. My impression is that our [133] 1912 pack was larger than our 1911 pack. In answer to a question based upon figures contained in a trade publication that the Pacific Coast salmon pack of 1911 was 2,819,942 cases and in 1912 was 4,064,827 cases, my answer is that I would not say, but if the paper says so, it is probably right. We had the same number of employees in our canneries in 1912 as we had in 1911. I would make the rounds of the four canneries. By water, the way

(Testimony of Crescent P. Hale.)

we travel, one cannery is 75 miles and another 65 miles from the other two, which are right together. To the small ones I would go two or three times a season, but to the two where I was stationed, I would go every day, two or three times a day; these were the larger canneries. Alaska Reds were packed at all of the canneries and put up all do-overs. Smith was superintendent of one of the smaller canneries and Claussen was at the other under my brother, in 1912. In re-processing the salmon in 1912 what was intended to be reprocessed was not put in any definite place; we take it to the menders and leave it there until it is mended. All that had to be re-processed was piled in the same place; no mark or any indication was placed on the can which enables a person in charge to know how long a can has been standing before it is again re-cooked; the day's work that is finished to-day next morning is picked up and is taken right to the mender, and he must finish it up that night; his contract calls for him to finish mending up that night. The foreman of the factory has charge. We do not allow the salmon do-overs to stay over three days; we follow that up very closely; the foreman has charge of that, and I, as superintendent, see that he does it. The only way I have [134] of knowing that the cans to be re-processed have not stood longer than three days, except what the foreman tells me, is to notice whether or not the number of such cans has increased from time to time. My impression is that the total of do-overs in 1912 was 6,500 cases; 5,000 went to plaintiff and I think

(Testimony of Crescent P. Hale.)

Getz Brothers got some. There were no complaints from the other 1,500. The pack was put up in July, 1912; between July first and July 20th the run of salmon never exceeds eighteen days. Five vessels carried the salmon from the canneries to San Francisco in 1912. We used a retort in 1911 and in 1912, but got our vacuum on the cans before using the retort, from the first cooking. We were then using what we call an open exhaust, but no exhaust box the same as a retort. I am not quite sure whether about that time we changed our system of cooking do-overs by using an exhaust box instead of a retort. I am quite sure we changed our system before 1911; it may have been 1910.

Redirect Examination.

Whenever the change was made it made no difference in the method and result of re-processing salmon. The big canneries, each having double the capacity of the small canneries, were two miles apart. In preparing a season's pack we take help with us to Alaska. We cannot tell in advance how big that pack will be. We have a contract with the men that require them to do so many cases a day.

Recross-examination.

We finished packing salmon July 22d or July 24th, 1912. Then we started right in to lacquer the cans, label [135] them and box them, then load them on the vessel.

Testimony of James J. Searle, for Defendant.

JAMES J. SEARLE, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am vice-president of the Haslett Warehouse Company; it operated the Mission Rock Warehouse in 1912. On September 7, 1912, we received ex ship "Standard" 250 cases of Archer Brand salmon; on September 18, 1912, we received ex "Oriental" 620 cases Archer Brand Salmon; on October 5, 1912, we received ex "George Curtiss" 1228 cases Archer Brand Salmon; on October 14, 1912, ex "Olympic" we received 2,993 cases Archer Brand Salmon. That made the total receipts of Archer Brand salmon. We had besides the salmon I have named, by the "Standard," Archer U 241 cases, Archer K 37 cases, Archer T 221 cases. On September 26, 1912, we sent one case to plaintiff and 2 cases on October 22, to plaintiff, one of which was delivered to the Pacific Mail Steamship Company marked S in a diamond with A. T. C. outside, all under order from defendant. The case delivered on September 26 was ex the vessel "Oriental." I do not know from what vessel the other two cases came. On November 15, 1912, we loaded on cars 1,000 cases Archer Brand addressed "St. Louis, Mo"; 900 cases Archer Brand addressed Chicago, and 1,000 cases addressed Louisville, of which 500 were labeled and 500 unlabeled Archer salmon. On November 4, 1912, 72 cases were thrown overboard or dumped by us under defendant's order. [136] The salmon that was dumped was from over-

(Testimony of James J. Searle.)

hauling the cases and removing damaged goods. On December 20, 1912, we dumped 118 more cases of Archer Brand on defendant's order, each case containing 48 tins. Our records show that the Archer Brand furnished plaintiff came from the 1912 pack.

Cross-examination.

On November 26, 1912, title to the 2,100 cases of Archer Brand salmon remaining in the warehouse was transferred from defendant to plaintiff.

Testimony of Oscar Hoffman, for Defendant.

OSCAR HOFFMAN, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am in the merchandise brokerage business, covering canned salmon and other food, and have been about 18 years in San Francisco. A do-over salmon is a salmon which for one reason or other has had to be re-cooked. I account for the disparity in prices between Standard and do-over salmon because of the presumption of a certain amount of salmon in the do-over lot which might not be good stock. It would be impossible to tell without opening the cans. In sampling salmon I would take perhaps one can out of 48 cases. In case of do-over I would be governed by conditions. I would probably decline to make an inspection of do-over salmon because there is such great hazard that I would not care to put my name to any certificate of inspection of do-over stock. I have often sampled salmon for shipment as the [137] best of the prime salmon; others not well mended or they are dry; some of the juices have leaked out

(Testimony of Oscar Hoffman.)

and air let into the can, are not as good quality and absolutely without value. Occasionally you find dryness and loss of juice among prime salmon if they are not well picked out. All cans are tested by tapping and you can tell by the sound if the can has the proper vacuum and as long as there is a vacuum in the can no air has entered the can and the fish is in good condition if it was first-class fish when it was originally put in. The do-over, on the other hand, is a can that has been mended, and frequently when the main leak has been found, a small secondary or even a third leak exists; there are sand holes or pin holes in the plate, so small that you can hardly discover them with a microscope; but there being a vacuum in the can, the air forces an entrance, and as soon as you get air into the can you start fermentation, and the fish in the can will rot or gradually spoil; not certainly, but it will gradually deteriorate and after a long time it will become unfit for food. Now, of course, anybody buying do-overs knows that they take chances on goods of this kind. If the do-overs were all mended, if such a thing were possible, they would be equal to any first-class salmon. I mean all the full weight cans, if they were well mended would be equal to first-class salmon, because the mending does not injure the can or contents.

Cross-examination.

I think a can of salmon to be re-processed could be put aside for a week if it were mended at once after a leak has been discovered before being re-cooked

(Testimony of Oscar Hoffman.)

and yet be all right under ordinary temperature. If you wait three, four or [138] five days before repairing the leak and the can was dry, it would be in bad condition. Supposing someone gives me a can of do-over salmon that has been brought down from Alaska and delivered in November; there is a vacuum in the can and the contents are found rotten two or three months thereafter. I think the reason for that is that probably they must have packed some stale fish originally; it is possible they allowed the can to remain too long before repairing the leak and then re-cooked it when it was not in good condition. As a rule leaks are mended the same day. At the present time, of course, we use a different process. Under the old process, there were a certain number of leak men who were working continuously in the cannery; as long as the work was going on well the leak menders could well keep up with the work, but if the original soldering of the cans was done in a slovenly manner, sometimes by inexperienced men soldering the tops on the can, you would have more leaks than usual, and the leak menders could not well keep up; but a foreman would always detect that by night, and if he saw an extra number of leaks around, he would remedy it the next day; some of those to be mended cans would only be taken care of the next morning or during the following day.

Q. It would depend a little on how busy they were in the cannery, how well they kept up with the repair of leaks in cans?

A. Yes, occasionally; the leak man is a very skilled

(Testimony of Oscar Hoffman.)

man, and occasionally sometimes it has become necessary to take one of these men away, if somebody else was sick or something of that sort and put them at some other work.

Q. If you had an unusual run of salmon I suppose in any one [139] year that was not provided for in advance, there would be a little bit more difficulty in the leak menders keeping up with the work?

A. I do not think so; your machinists cannot do but so much work; they work at a certain gait; no matter how many fish you have on the counters you cannot extend the packing.

The COURT.—It frequently arises in a heavy run that more fish are brought in than can be processed by the capacity of the factory and they have to dump them overboard, don't they?

A. That is very seldom; that is only when extraordinary warm weather sets in; ordinarily, if you get too many fish one day you tell your men not to go out the next morning, but if extraordinarily warm weather sets in it sometimes occurs up there.

Mr. KNIGHT.—Q. Do you ever have an extraordinary run where the men out on the fish dock are unable to get down to the fish that have been first put on the dock, by reason of the fact that so many fish have been piled on top of them, and sometimes you find a decomposed product at the bottom of your quantity of fish.

A. That would be very rare, only in some very small canneries; they would not be on the dock; they would be in the fish boats and fish scows, because

(Testimony of Oscar Hoffman.)

your dock is always cleaned off; there would be a possibility of having a boatful of fish and not taken care of, and being out in the sun.

Q. Mr. Fortman, a swell is the product of gas arising from decomposition of salmon that is caused by the air getting in from the outside of the can, isn't it?

A. Yes. [140]

Q. So that when you have a swell we may say generally you have a can in which the leak has not been completely mended?

A. Probably so; but on the other hand, again, you possibly could produce a swell by imperfect cooking; if your cooking was not well done to commence with, your fish would also decompose and swell.

Q. Even although the cans were hermetically sealed? A. Yes.

Q. You cannot tell, I presume, from looking at a can of salmon ordinarily as to its contents, can you?

A. No.

Redirect Examination.

In standard salmon we generally run from about $\frac{1}{4}$ to $\frac{1}{3}$ of one per cent defective cans. In the do-overs you possibly would find $\frac{1}{2}$ of the cans in reasonably good condition, another $\frac{1}{4}$ fit for consumption, but they would be partially dry or something of that sort, and $\frac{1}{4}$ would probably be unfit for use. The $\frac{1}{4}$ which I stated were fit for consumption but dry would not be detrimental to your health if you ate them, only they would be unsightly and dry. In my experience as president of the Alaska Packers' Association the proportion of do-overs that would

(Testimony of Oscar Hoffman.)

be detrimental to health—rotten—would be very few, possibly there would be 10% that would be. In re-cooking the salmon it becomes very soft in these do-overs, the second cooking; those naturally would be edible fish; they would not be palatable fish.

Mr. KNIGHT.—Q. Do I understand the experience of [141] the Alaska Packers is, taking a run over a number of years, that about 10 per cent of the do-over pack would be unfit to eat?

A. Well, I do not mean unfit to eat; it would not be eaten; a lot of it would be unsightly, would be soft.

WITNESS.—(Continuing.) I do not know the percentage of do-over salmon put up by the Alaska Packers' Association that was absolutely unfit to eat, because we generally sold our do-overs without reclamation; we had no statistics as to that; they would never come back to us. I don't think I would have heard it if there was any complaint. If you sell do-overs under a guarantee to come up to a certain pack you might as well sell them for prime salmon, because if they can return all the poor ones and keep all the good ones, there is no reason for reducing the price on do-overs.

Q. So you do not think if you should sell 100,000 cans of do-overs, for instance, in this market, and there had happened to be a very large percentage bad, you would have heard of it?

A. No, because as a rule our do-overs were sold after examination; the purchaser had a right to ex-

(Testimony of Oscar Hoffman.)

amine them and pass his own judgment on the goods. We sold through J. K. Armsby & Company; they have made no reclamation on do-overs because we sold as is. I am, therefore, unable to give any estimate. The only reason why I think that 10 per cent figure is in the following manner: Sometimes do-overs would not be sold the year when they are packed; if the salmon market was extraordinarily dull, we would hold them over for the following year, and then overhaul them and take out every swell, and we found that sometimes [142] they would run as high as 10 per cent swelled cans in the do-overs after being in the warehouse in San Francisco six months or a year. We do not overhaul them until they are contracted for. In overhauling six months or a year afterwards it might disclose 10 per cent of swells.

Testimony of Julius Phillips, for Defendant.

JULIUS PHILLIPS, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am connected with Getz Brothers, wholesale grocers, handling canned salmon, and have been for over thirty years. I know the Archer Brand do-over salmon; we handled some of that pack in 1912, that is, sold it to the trade; we never had any complaints about that salmon.

Cross-examination.

We probably had five or six hundred cases; we did not buy them, we handled them on consignment basis upon a commission. A large portion of it was, as

(Testimony of Julius Phillips.)

I remember, shipped to Sacramento and the balance was distributed among small dealers in San Francisco or elsewhere in the state. [143]

Testimony of Willard Smith, for Defendant.

WILLARD SMITH, a witness called on behalf of defendant, being duly sworn, testified as follows:

I was employed by defendant in 1912; I was in Alaska that summer; I was foreman under Mr. Hale at Lockanok cannery, one of the large canneries. I know what is meant by overhauling salmon. The cases are opened, each can looked at, swells and rusty tins and very light cans are taken out, and the good put back in the case; bad ones are afterwards dumped. In the fall of 1912 I overhauled the Archer Brand of salmon at Mission Rock; I separated the rusty tins and the swells and the light cans. There was no difference in the methods used at Lockanok cannery in 1912 for re-processing salmon; the same methods were used in 1911. We mend them as soon as we can get to it. We never allow them to stand over a couple of days at most.

Testimony of Chan Way, for Defendant.

CHAN WAY, a witness called on behalf of defendant, being duly sworn, testified as follows:

I worked at Lockanok cannery, in Alaska, in 1912. I take the Chinamen up there and I fix the cans of do-overs. The Chinamen I employed in 1912 were the same as in 1911. I know what a do-over is. It has a little leak, make it light; we fill them up with fish soup and cook them over. Fish soup is good fish

(Testimony of Chan Way.)

cooked whole and then fill the [144] do-overs with the soup. I open, I taste them; if no good I throw them away. I mend leaks every day. I got a contract with the company to mend the leaks every 24 hours or he charge it to me. The longest they stand is about 2 days; I have to finish the leaks every day.

Cross-examination.

I supply Chinamen under contract with the salmon people. I get paid by defendant for every case I put up. If I put up a can of salmon that is no good, the defendant charge me, I think about \$1.50 a case. Everything was good in 1911 and 1912. They didn't charge me anything in 1912; every can was good.

Testimony of George F. Smith, for Defendant.

GEORGE F. SMITH, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am the father of Willard Smith; I was employed as superintendent by defendant at the Nushagak Cannery, one of the smaller canneries of the defendant in Alaska. There was no difference in the process employed in the manner of packing do-over Archer Brand in 1911 from 1912. We used the same quality of merchandise and the same quality of cans in the year 1912 as we used in 1911. There was no distinction whatever in the manner of putting up the 1912 pack of Archer [145] Brand salmon from the same brand during the year 1912. We do not allow do-overs to stand at all if we can help it; sometimes they stand probably from 36 to 40 hours. That has always been the rule. They did not stand any longer in 1912 than in any other year.

(Testimony of George F. Smith.)

Cross-examination.

Besides the Lockanok and Nushagak canneries there were the Egakak and Kjickak canneries belonging to defendant on Bristol Bay. The Kjickak and Lockanok were the larger canneries. The foreman is responsible for seeing that the leaks are properly mended and salmon properly re-processed. I myself investigated to see whether the foreman was doing his duty.

DEFENDANT RESTS.

The foregoing is all of the evidence given on the trial.

Thereupon the case was argued by counsel for plaintiff and defendant, respectively. [146]

Prior to the conclusion of the testimony in the case and before the argument to the jury was commenced, plaintiff requested the Court to give to the jury the following instructions:

Instructions to Jury Requested by Plaintiff.

Instruction No. 1: It is admitted here by the pleadings that the salmon in question was packed in the Territory of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall

be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this State from any other State or territory, and the sale in this State of any article of food which is adulterated, within the meaning of this act, is prohibited, and that any person who shall so import or receive any such article so adulterated, or who having so received in this State shall deliver for pay, or otherwise, any such article so adulterated, shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act.

Nor is it necessary that the adulteration be added by the hand of man. It is sufficient, in the eyes of the law, if it be added by nature.

Instruction No. 11½: It is a rule of law "that all laws in existence when an agreement is made necessarily enter into, and form part of, it, as fully as if they were expressly referred to and incorporated into its terms."

Hence the Pure Food and Drug Acts, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express

provision against the delivery of salmon which is adulterated within the meaning of that act. [147]

Instruction No. 2: If you shall find that the salmon in question, when the cans were opened, was so badly, or otherwise, decomposed as to be unfit for human consumption, you are entitled to believe and find that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore, prohibited.

Instruction No. 3: The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, then its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to \$16,961.30, with interest on \$9,821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

Instruction No. 3-A: If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in igno-

rance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which it is agreed amounted to \$16,-961.30, with interest on \$9,821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

Instruction No. 4: One criterion for determining the edible character of an article prepared in an hermetically sealed can for human consumption is its condition at the time the can is opened for such consumption; for "The condition of the product in the hands of a consumer is the place and time to test its fitness for food."

If it is then either filthy, decomposed or putrid, its condition is such as to make its importation into this port a violation of law, both State and National, and its sale a void transaction; for a sale prohibited by law is void. If, therefore, you shall find that a substantial part of the cans of salmon in question, when opened, were filthy, decomposed or putrid, then you should find that the salmon was adulterated within the meaning of the law when it was originally brought into this port. Its sale, therefore, being void, plaintiff is entitled to recover the amount paid to defendant for the salmon, with interest thereon from the time of payment to the time when your verdict is rendered. [148]

Instruction No. 5. A shipper of merchandise prohibited by the Pure Food Acts is responsible for the act of sending, even although he may be wholly

unaware of the condition of the article shipped, or may have nothing to do with such condition except as possession or ownership of the article make him responsible.

Ignorance by a packer or manufacturer of the unfitness for human consumption of an article packed or prepared by him, like ignorance of the law, does not excuse him, or make valid a transaction otherwise invalid.

Instruction No. 6. You are further instructed that when anyone sells an article of any kind

“although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it.”

This is especially true in view of the State and Federal Pure Food Acts.

This rule rests

“upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as ‘the purchaser cannot be supposed to buy goods to lay them on a dung hill,’ * * * it will not be assumed that the seller desires to obtain money for a worthless article.

“So that, upon this issue, after considering all the evidence, if you find”

therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time.

Instruction No. 7. The contract made between the parties to the suit provided, among other things, that the “Archer” brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this State, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those Acts, even if plaintiff did not inspect the salmon before taking delivery. [149]

Instruction No. 8. I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than, do-over salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representa-

tions so made by defendant concerning it, or with the samples furnished by defendant to plaintiff, but was unmerchantable, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that inspection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery can be had by plaintiff, since defendant by its conduct, in such event, is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff.

Instruction No. 9. I further charge you that by the contract in suit defendant warranted that the "Archer" brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of "Archer" brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

Instruction No. 10. You are not concerned with the determination of the question as to whether or not a do-over salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in

controversy was purchased warranted that this salmon, no matter what the general character or reputation of do-over salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.

You are, therefore, only concerned with the determination of the question: Was the "Archer" brand pack of 1912 delivered to plaintiff by defendant equal in quality to the "Archer" brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the Fall of 1912 suitable for human consumption? [150]

The Court thereupon charged the jury as follows:

The COURT.—Gentlemen, I will detain you but a few minutes, if you will give me your attention, because the issues are rather confined under the evidence and the principles are not intricate.

This, as you are well aware by this time, is an action brought by the plaintiff to recover for an alleged breach by defendant of a written contract for the sale and delivery to plaintiff in San Francisco during the season of 1912, of 5,000 cases of do-over grade, Red Alaska Salmon, of the "Archer" Brand. It is admitted that the salmon was delivered and paid for.

The contract, so far as it relates to the goods in controversy, provides that the shipment was to be overhauled by defendant, the seller, at San Francisco, and all swells and rusty tins were to be taken therefrom, after which "no reclamation of any nature will be allowed"; and that plaintiff was to

have the privilege of inspecting the salmon before taking delivery; and it further guarantees that the salmon shall "be equal to the 1911 pack," as expressed.

The provision that after the removal of the swells and rusty tins "no reclamation of any nature will be allowed" must be understood, in view of the nature of the goods involved and the other provisions of the contract referred to, as meaning that after such removal no reclamation could be had for defects of the character specified, that is, such defects as may usually be ascertained by external inspection at the time of the tins or containers. In other words, while no recovery may be had by the plaintiff for loss suffered through swells or rusty tins developing after such inspection and removal, the provision does not mean that reclamation may not be had for defects, if they existed at the date of delivery, that could not be so discovered or detected, which either rendered the goods unfit for the purpose for which it was dealt in by the parties, or made it of a quality below that of the pack of 1911; otherwise, the provision guaranteeing the fish to be equal to the pack of 1911 would have no effect.

There is no controversy over the fact that the purpose for which the salmon was sold was for human consumption. It was, therefore, the duty of the defendant, under the terms of the contract, and the law as well, to deliver to plaintiff salmon which was, at the time of its delivery, substantially capable, taking and regarding the shipment as a whole, of being used for such purpose, since the Pure Food Law of the

United States forbids the sale for that purpose of decomposed and adulterated food. Therefore, should you find that the salmon was not at the time of its delivery, substantially of a character, that is, over and above the percentage of defective cans usually found in goods of the character of those involved, in condition, taking the shipment as a whole, of being used for human consumption, and that plaintiff did not [151] know and could not have ascertained at the time it took delivery that such was its condition, except by opening the cans and thereby destroying its marketable quality, plaintiff is not precluded from recovery for such defects, and your verdict should be in its favor for the difference between the market value which the salmon would have had at the time of its delivery to plaintiff, had it been of the quality called for, and its actual value as delivered.

And, should you find that the salmon, as a whole or an entirety, by reason of its spoiled condition at the time of delivery, had no real value as a merchantable commodity, there would be an entire failure of consideration, and in that event you should return a verdict in favor of plaintiff for the amount paid by it to the defendant for the salmon, which it is admitted was \$16,961.30, together with interest on \$9,821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from the 26th day of November, 1912, the respective dates of payment, to the present time, at the rate of 7 per cent per annum.

As stated, the contract guaranteed the salmon in question to be equal to the 1911 pack of the same

brand. It is admitted that the latter was, at the time of its delivery, in good condition for human consumption. Therefore, should you find that the salmon delivered under this contract was at the time of delivery substantially equal in quality and condition to the salmon delivered in 1911, then the defendant has fully complied with the contract and your verdict should be in its favor.

But if you find that the salmon was not, at the time of its delivery, substantially equal in quality and condition with that of 1911, defendant has not fulfilled its guarantee, and plaintiff will be entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with, over its actual market value at that time in the condition in which it was delivered.

Should you find that the salmon was, either as a whole or to any substantial extent over and above the usual percentage of spoiled or defective cans, unfit for human consumption at the time of its delivery, ignorance of such fact by defendant would not excuse it from fulfilling its contract to deliver salmon of the character stipulated.

Should you find that the salmon was, at the time of its delivery, by reason of the defects, complained of, as whole, unfit for human consumption, and that at the time plaintiff took delivery and paid the purchase price it was ignorant of such unfit condition, and that it was impossible for plaintiff to then ascertain the condition of the salmon, except by opening the cans, then taking delivery and payment of the purchase

price would not preclude a recovery by plaintiff of the damages it has [152] suffered, if any, from the failure of defendant to comply with the terms of the contract.

Should you find that the salmon, as a whole, was at the time of its delivery substantially of the character called for by the contract, as I have construed it for you, but that some of the swells and rusty tins were inadvertently or unintentionally overlooked by defendant in making its examination, that plaintiff did not exercise its privilege of inspecting such shipment before taking delivery, nor make a claim for reclamation on account of such omission within the time provided by the contract, and was not prevented therefrom by any false statement or act wilfully made or done by defendant with intent to prevent plaintiff from making such claim, then plaintiff cannot recover by reason of any damage flowing from such omission.

Except so far as their provisions may be covered or embraced within the principles that I have stated to you, neither the Pure Food and Drug Act of the United States, nor the Food and Drug Act of this State, which have been referred to before you, are involved in this case.

Now, Gentlemen of the Jury, those are the specific principles for your guidance in passing upon the evidence in this case that pertain to the rights of the parties under this contract. There are certain general principles that you should understand and which perhaps I have sufficiently indicated during the prog-

ress of the trial on various occasions, but I will restate them.

The burden of proof in an action such as this, in a civil action, rests upon the plaintiff to establish by a preponderance of evidence the fact that it relies upon in order to make out a case and entitle it to a recovery. That burden is cast on it because it takes the onus of proof in bringing its case; it has the affirmative, and it must establish those facts by the degree of proof I have indicated or it fails in its action; and if upon any fact which has been here brought to your attention as in issue, upon which you are not satisfied that the truth preponderates in favor of the plaintiff, then the plaintiff *such* be regarded by you as having failed to establish that fact to the degree that the law calls upon it to do.

The jury are the exclusive judges of the facts in the case. With this, the Court has nothing to do; and I may add that in that regard it is always a relief to have an opportunity to cast that burden upon the shoulders of someone else rather than the occupant of the bench. You are here for the purpose of passing upon the facts, and the evidence is therefore addressed solely to you. The Court regulates the trial by directing as a matter of law what shall be considered as pertinent for your consideration, and what shall be excluded; but when evidence is admitted, you alone pass upon its weight and its credibility. Its credibility depends upon the degree [153] of consideration that you deem the evidence of the various witnesses entitles it; you note their appearance upon the stand, the manner of their testi-

mony, and the matter of their testimony. If you are of the opinion that a witness upon the stand has given evidence of bias or prejudice for or against a party, and that his evidence has been colored by that attitude of mind on his part, then of course you must take that into consideration in determining what degree of credibilty you will accord to his entire testimony. Of course, that does not exclude his evidence entirely, however prejudiced the witness may be; he is entitled to have a fair and impartial consideration of his evidence in the light of that fact.

The mere fact that a witness may make a misstatement or a contradiction or be mistaken as manifested by other evidence in the case, does not entirely discredit him. It should make you more careful, of course, in examining his evidence in other respects, but it does not entirely discredit him; but if a witness comes upon the stand and makes a statement which you are satisfied, in the light of the other evidence in the case, or from his manner, or from the contradiction that he makes, is not true, and it was made with the purpose to deceive or lead you into believing that it was true, that fact entirely discredits a witness in the judgment of the jury, unless they are satisfied by all the other evidence in the case that in some respects his evidence is true. But a false statement upon the witness stand is always ground for the jury entirely discrediting a witness and casting his evidence out of their consideration for any purpose in the case.

Now, the evidence, as I say, has all been submitted to you in this case, and I do not propose to comment

upon it. You have heard the respective contentions of counsel; that is their right; they have a right to enlighten you as to their views, and to point your minds to what they deem the proper deductions to draw from the evidence. But, after all, gentlemen, it is not the claims of counsel that are to govern you; it is the conclusion that you reach from a fair and impartial consideration of the evidence itself, entirely untrammelled in your mind by any aspect claimed for it by counsel.

In this case, as I say, the plaintiff must make out its case by a preponderance before it can recover. It must, in the first place, establish to your satisfaction that there has been a breach of this contract by a failure to comply with the terms of the contract in accordance with what the court has advised you that contract means. If it has satisfied you that there has been a breach of this contract, it must furnish you a reasonable basis upon which you can, without speculation, without going out into the realms of conjecture, find with reasonable certainty the damage that it has suffered; but if the plaintiff fails to furnish a jury with that degree of evidence, then, although it may appear that it is entitled to recover, the jury are at liberty to render a [154] verdict for nominal damages, as I suggested the other day. of one dollar or any other insignificant sum. But if you find here that the plaintiff is entitled to recover, and there is evidence upon which you can frame a reasonable conclusion as to the amount that it has suffered, then it will be entitled, within the limits of its prayer, to such amount as you

find, under the principles I have stated to you, it is entitled to recover.

You have observed, not only throughout the argument of counsel, but frequently throughout the trial of the case, that the date of delivery has been adverted to frequently as the crucial point at which the question of the carrying out of this contract must depend. In other words, if the defendant furnished and delivered to the plaintiff salmon that at the time of its delivery substantially complied with the terms of that contract, it has performed that contract and cannot be held responsible for any injury that may have thereafter resulted to the plaintiff through circumstances for which it would not be responsible. If, however, you find from the evidence that at the time of delivery this salmon did not, in the respects that I have indicated to you, comply with that contract, then the defendant would be responsible, because that is the pivotal point at which its responsibility attached or ceased, as the case may have been; its responsibility attached or remained, if it was not delivering the article that was contracted for; its liability and responsibility wholly ceased at that moment if the article at that time was in compliance with the terms of its contract.

Now, I think that with these suggestions you will be enabled to reach a verdict without much difficulty. Under the federal system, the jury must be unanimous in their verdict; they cannot reach a conclusion by less than the entire twelve, as you may under the state system.

The clerk has prepared forms of verdict which you will find will meet your necessities under the instructions that I have given you. In the event you find for the plaintiff, it will be your duty to fill in the blank the amount that you find the plaintiff is entitled to recover, including interest; that is, the principal and interest should not be stated separately; you simply say, "We find for the plaintiff" in such an amount, and that will be the principal and interest. If you find in favor of the defendant, however, there being no counterclaim or affirmative demand on the part of the defendant, it will simply be a finding in favor of the defendant, and the law will attach the consequence to that as to plaintiff's right to costs.

Are there any exceptions?

Mr. KNIGHT.—Will your Honor give us an exception as to each instruction requested on behalf of the plaintiff which the Court did not give and each requested instruction the Court gave in a modified form? [155]

The COURT.—I do not think I gave any of your instructions; I extracted the principle.

Mr. KNIGHT.—I do not know whether it may be considered a modification, the extraction of the principle.

The COURT.—You are entitled to an exception. The foregoing exception is designated as "Plaintiff's Ex. No. 8. "

Mr. WISE.—I do not understand that it is your Honor's rule that such exceptions may be taken in an omnibus way, but your Honor's attention should be directed to those parts of the court's charge to

which counsel excepts. If that be so, we ask to reserve an exception to that portion of your Honor's charge in which you interpreted the contract as confining the matter of reclamation to swells and rusty tins at the time of delivery or thereafter; to that portion of your Honor's instruction in denying the warranty as the same appears on the contract, and the construction thereof with regard to time of delivery; and one instruction of your Honor that if the value at the time of delivery be found by the jury to be practically nothing, or words to that effect, then there is a total failure of consideration which would entitle the plaintiff to recover its purchase price.

The COURT.—The amount paid.

Mr. WISE.—To that portion of your Honor's charge, and if we might add an exception to your Honor's refusal to charge the jury as requested by defendant in instruction No. 2, instruction No. 4, instruction No. 5 and instruction No. 6. Those are all instructions, if your Honor please, with reference to the interpretation of the contract.

The COURT.—You may retire gentlemen.

(Thereupon, at 11:10 A. M., the jury retired to deliberate upon their verdict; at 12:55 the jury returned into court with a verdict in favor of the plaintiff and assessing damages in the sum of one dollar.)

Mr. KNIGHT.—I do not know whether a verdict is deemed excepted to, your Honor?

The COURT.—I think it is, but you can preserve an exception.

The foregoing exception is designated as

PLAINTIFF'S EXCEPTION No. 9. [156]

**Order Settling, Certifying and Allowing Bill of
Exceptions.**

The foregoing bill of exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions, and that it contains all of the testimony offered and received, and all of the exhibits introduced, and all of the proceedings had on the trial of said cause.

Dated this 26th day of March, 1917.

WM. H. HUNT,
United States *District* Judge for the Northern District of California, Second Division.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [157]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

American Trading Company (Pacific Coast), a corporation, plaintiff in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment entered herein on the 11th day of October, 1916, comes now by Samuel Knight, its attorney, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated April 3, 1917.

SAMUEL KNIGHT and
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [158]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named American Trading Company (Pacific Coast), a corporation, plaintiff herein, and makes and files the following Assignment of Errors.

I.

The above named District Court erred in sustaining the demurrer to the third count of the amended complaint herein.

II.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of the original judgment-roll in the case of United States of America vs. Twenty-One Hundred Cases of Canned Salmon, theretofore pending and determined in said District Court of the United States in and for the Northern District of California, and which ruling is designated in the bill of exceptions herein as Plaintiff's Exception No. 1.

The foregoing judgment-roll in substance shows that in this case the United States, on July 12, 1913, filed a duly verified libel against said cases of salmon and said libel sets forth that said twenty-one hundred cases of salmon had been shipped by the North Alaska Salmon Company in interstate commerce from the territory of Alaska to the city and county of San [159] Francisco on the steamers "St. Andrews," arriving at the latter place September 7, 1912, "Oriental," arriving at the latter place September 18, 1912, "Curtis," arriving at the latter place October 5, 1912, and "Olympic," arriving at the latter place October 14, 1912; that said salmon was in the same condition when said libel was filed as it was when shipped from said territory of Alaska to said city and county of San Francisco and has been, ever since the respective times when it reached said city and county of San Francisco, as aforesaid, in the same condition in which it was at the time said libel was filed. Said libel further sets forth that on October 26, 1912, said North Alaska Salmon Company sold said twenty-one hundred cases of salmon to American Trading Company (Pacific Coast); that the fish contained in said twenty-one hundred cases was adulterated under the provisions of section 7, paragraph 6 of the act of Congress of June 30, 1906, known as the Food and Drugs Act, in that said fish consisted in whole or in part of a filthy, decomposed or putrid animal or vegetable substance. Said libel further sets forth that said twenty-one hundred cases of salmon constituted an interstate shipment from said territory

of Alaska to said city and county of San Francisco and at the time of filing said libel was within the jurisdiction of said District Court in the original, unbroken cases. The prayer of said libel was for the seizure and condemnation of said salmon under said act of Congress and for the usual process, and that said American Trading Company (Pacific Coast), and all other persons, firms or corporations having, or pretending to have, any right, title or claim to said salmon be cited to appear and answer.

Said libel contains, as an exhibit thereto, a report from the Secretary of Agriculture of the United States, directed to the United States Attorney for the Northern District of California, dated at Washington, D. C., July 11, 1913, setting forth that said [160] American Trading Company then had in its possession said salmon packed and processed by said North Alaska Salmon Company and transported from said Territory of Alaska to said City and County of San Francisco, and sold and delivered to said American Trading Company November 26, 1912. The report further sets forth the particular steamers upon which said salmon was transported, as aforesaid, and that it was at the time of said report on the premises of Mission Rock Warehouse of the Haslett Warehouse Company at said San Francisco. Said report further sets forth that the cases of said salmon were branded "4 doz. talls Archer Brand Salmon—packed for A. B. Field and Co., Inc. Agents San Francisco," and said cans were labeled "Archer brand Alaska salmon—red—A. B. Field

and Co., Inc., distributors San Francisco.” Said report further sets forth that official samples of said salmon analyzed in the Laboratory Bureau of Chemistry at said San Francisco showed that out of one hundred cans twenty-eight per cent of the contents was putrid or sour, that the produce was a “do-over” product, and another analysis of official samples in said laboratory showed thirty-nine per cent of said salmon to be putrid or sour; that said laboratory also reported that the owner of said salmon examined four hundred and seventeen cans and admitted that thirty-two per cent was sour, putrid and decomposed. Said report further contained a recommendation for the seizure and confiscation of said salmon.

Said judgment-roll further shows that a verified answer to said libel was interposed by said American Trading Company (Pacific Coast) as claimant of said salmon, denying that all of said fish was adulterated within the meaning of said Act of Congress, but alleging and admitting that theretofore for the purpose of determining the fitness of said salmon for consumption and after its importation into said port of San Francisco, as set forth in said libel, said claimant made an examination of one [161] hundred cases thereof as a sample and ascertained that twenty-five per cent of the contents of said sample was sour, rotten and putrid; that a considerable quantity of the contents of others of said one hundred cases was also unfit for consumption; that thereafter further examination of said twenty-one hundred cases of salmon was made by said claimant by selecting out of every five cases of the entire lot one

tin which was neither rusty, swelled nor in any way indicated a defective condition, and that of those tins, so selected as aforesaid, one hundred and twenty-six out of the four hundred and seventeen tins, or 30.2 per cent thereof, were found to be sour, rotten and putrid, and that a further considerable quantity of said salmon was found to be unfit for consumption, and that the total amount of said salmon, so found unfit for consumption as the result of said examination, was approximately from sixty-five to seventy per cent of the samples so selected.

Said answer also sets forth that a considerable quantity of the tins containing the salmon referred to in said libel was swelled or discolored and indicated that the contents thereof were not fit for consumption. Said judgment-roll further shows that Monition and Process were issued upon said libel; that said salmon was attached by the United States Marshal for said Northern District of California July 14, 1913; that due notice was given to all persons of the hearing of said cause; that proclamation upon said libel was made; that on September 18, 1913, said cause came on to be heard upon said libel and answer, the default of all parties other than said claimant having been entered, and as the result of said hearing the said District Court directed a decree to be entered for the condemnation and destruction of said salmon "for the reasons and causes in said libel of condemnation set forth." [162]

III.

That said District Court erred in sustaining the defendant's objection to the admission in evidence

of a certified copy of the judgment-roll in the case of United States of America vs. Three Hundred Cases of Salmon, theretofore pending and determined in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and which ruling is designated in said bill of exceptions as Plaintiff's Exception No. 4.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled said three hundred cases of salmon, each of which was labeled as follows: "Archer 4 doz. Talls Brand (Design of Indian with bow and arrow) (Design of fish) Alaska Salmon Packed for A. B. Field & Co., Inc., Agents—San Francisco." The verified libel, filed May 12, 1913, charges that each of these cases contained four dozen cans of salmon, each labeled and branded as follows: "Archer Brand (Design of Indian with bow and arrow) Alaska Salmon Red, (Design of Fish) A. B. Field & Co., Inc., Distributors, San Francisco." Said libel further charges that these cases and cans and their contents were adulterated in violation of section 7 of the act of June 30, 1906, known as the Food and Drugs Act and were liable to confiscation because the food product contained in the cans were putrid and decomposed and had an offensive odor; that said fish were known as "do-overs" and were in large part filthy, putrid and decomposed animal product and substance and wholly unfit for food. Said libel further sets forth that these cases and cans and their contents were unlawfully shipped by A. B. Field & Company for sale in interstate commerce

from San Francisco, California, to St. Louis, Missouri, and received at the latter place on or about November 30, 1912, and remained unsold and in the original and unbroken packages [163] and in the possession of Merchants National Grocer Company. A warrant of arrest for said salmon and Monition were thereupon duly issued on said 12th day of May, 1913, and return made on the following day by the United States Marshal for said District, showing that they were served at St. Louis, Missouri, on the day last mentioned on Wallace Harker, Manager of said Merchants National Grocer Company, and that seizure was made of 289 cases of said salmon on the premises of the latter and further that due publication was made of the arrest of said property, time assigned for return of said warrant and of the hearing of said cause, which return was accompanied by proof of such publication. Thereafter and on June 5, 1913, the date of the hearing, the said Court rendered its decree, in default of appearance by any claimant of the property so seized, finding the jurisdictional facts and further finding therein that "said two hundred and eighty-nine cases of salmon were on or about the 30th day of November, 1912, unlawfully shipped for sale in interstate commerce by A. B. Field and Company from the city of San Francisco in the State of California, to the city of St. Louis, in the State of Missouri, to said Merchants National Grocer Company, in violation of Section 7 of the Act of Congress of June 30, 1906, known as the Food and Drugs Act; that said salmon when so shipped, as aforesaid, was adulterated in violation of

said Act of Congress and was liable to seizure, confiscation and condemnation as provided in said Act” for the following reasons, to wit: “That the said food product contained in said cases is putrid and decomposed and has a pronounced and offensive bad odor; and that the said fish contained in said cases are known as ‘do-overs,’ and that the said contents consist wholly or in large part, of filthy, putrid and decomposed animal product and substance, and are wholly unfit for use as food.” Condemnation and destruction of said merchandise was thereupon ordered by said Court. [164]

IV.

The said District Court erred in sustaining the defendant’s objection to the admission in evidence of a certified copy of the judgment-roll in the case of United States vs. Twenty-four cases, more or less, containing four dozen cans each, theretofore pending and determined in the District Court of the United States for the District of Indiana, and which ruling is designated in said Bill of Exceptions as Plaintiff’s Exception No. 5.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled said twenty-four cases, more or less, containing four dozen cans each of salmon in possession of the International Grocer Company, an Indianapolis corporation. The verified libel, filed April 19, 1913, charges that each of these cases was labeled and branded as follows: “4 doz. talls Archer Brand Alaska Salmon, Packed for A. B. Field & Co., Inc., Agents, San Francisco.”

Said libel further charges that the salmon violated the said Pure Food and Drug Act of Congress in that it "consists in part of a filthy, putrid and decomposed animal substance" and had been theretofore transported from Missouri to Indiana in violation of said Act. Attachment and Monition were thereupon issued and the Marshal's return sets forth the seizure of said salmon on April 21, 1913, and publication of the notice of hearing. Thereafter, on June 5, 1913, the date of the hearing, defaults of all interested parties were taken by order reciting that due process had been issued, and on September 26, 1913, said Court rendered and caused to be entered its decree condemning and ordering destroyed said salmon as adulterated, filthy, putrid and decomposed, as aforesaid.

V.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of a certified copy [165] of the judgment-roll in the case of the United States of America vs. Seventy-five Cases, more or less, of Canned Salmon, theretofore pending and determined in the District Court of the United States for the Western District of Kentucky, and which ruling is designated in said bill of exceptions as Plaintiff's Exception No. 6.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled one hundred and fifty cases of canned salmon, described and marked as aforesaid. The verified libel, filed May 26, 1913, and amended verified libel, filed May 27, 1913, set

forth that on December 11, 1912, the Merchants National Grocer Company, doing business in St. Louis, Missouri, shipped and consigned therefrom to the National Grocer Company, Inc., doing business at Louisville, Kentucky, said one hundred and fifty cases of canned salmon and that seventy-five of those cases remained in said city of Louisville on the premises of said National Grocer Company, Inc., in the original, unbroken packages in which said articles of food had been so shipped and transported. Said libels further set forth that each case of said salmon contained four dozen cans and were liable to confiscation as being adulterated within the meaning of said Food and Drugs Act of Congress, for the reason that at the time of their shipment aforesaid, they "were then and there on said date, and have ever since been, and are now, adulterated, in that the contents of each of said cans consist in part of a filthy and decomposed animal substance." Thereupon attachment and Monition were duly issued on which the marshal returned that on May 26, 1913, at Louisville, Kentucky, on the premises of the said National Grocer Company he served said process and seized said seventy-five cases of canned salmon. The record contains proof of due publication of process and the decree of the Court, rendered on September 2, 1913, recites [166] the jurisdictional facts; that no one appeared to claim said property or any part thereof; that the default of all persons was entered; and it was adjudged that the property be condemned as of a deleterious character within the meaning of said Food and Drugs Act.

VI.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of a certified copy of the judgment-roll in the case of United States of America vs. Twenty-eight cases, more or less, of Archer Brand Salmon, theretofore pending and determined in the District Court of the United States for the Southern District of Illinois, Northern Division, and which ruling is designated in said Bill of Exceptions as Plaintiff's Exception No. 7.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled twenty-eight cases, more or less, containing Alaska Salmon, in the possession of United Retail Merchants Grocer Company, of Peoria, Illinois, The verified libel, filed June 6, 1913, describes the salmon as labeled on each of the cases thereof "Archer Brand Salmon (Design of Indian with bow and arrow shooting at a fish), Alaska Salmon. Packed for A. B. Field & Co., Inc., Agents, San Francisco," and that each of the four dozen tins contained in each case was labeled "Alaska Salmon Red A. B. Field & Co., Inc., Distributors, San Francisco, Archer Brand (Design of Indian with bow and arrow)," and sets forth that the food product contained in these cans was adulterated, in violation of said Act of Congress, and liable to condemnation and confiscation for the reason that it consisted in whole or in part of a filthy, decomposed and putrid animal substance and of portions of fish unfit for food. Said libel further sets forth that these cases of salmon,

adulterated as aforesaid, had been transported from Merchants National Grocer Company in St. Louis, Missouri, to [167] Peoria, Illinois, on December 12, 1912. A Monition and Writ of Attachment were thereupon issued, returnable the first Monday in August, 1913, and the Marshal's return thereon shows seizure of thirty-five cases and seventy-nine cans of salmon on the premises of the United Retail Merchants Grocer Company, 918 South Adams Street, Peoria, Illinois, and service of said Monition on the last-mentioned day. The record shows the due publication of said Monition, and on Monday, August 4, 1913, the said Court rendered and caused to be entered its decree reciting the jurisdictional facts; that no one has appeared or answered as a claimant; that said seventy-nine cans and thirty-five cases of Archer Brand Salmon, seized as aforesaid, had been transported in interstate commerce and were subject to confiscation and condemnation because the article of food therein contained was unfit to be used as food; and in whole or in part consisted of a filthy, decomposed and putrid animal substance and portions of fish unfit for food, and directed the destruction of said salmon.

VII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 1, reading as follows:

It is admitted here by the pleadings that the salmon in question was packed in the Territory

of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this State from any other state or territory, and the sale in this state of any article of food which is adulterated, within the meaning of the Act, [168] is prohibited, and that any person who shall so import or receive any such article so adulterated, or who having so received in this state shall deliver for pay, or otherwise, any such article so adulterated, shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act. Nor is it necessary that the

adulteration be added by the hand of man. It is sufficient, in the eye of the law if it be added by nature.

This exception is designated in said bill of exceptions as Plaintiff's Exception No. 8.

VIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 11½, reading as follows:

It is a rule of law "that all laws in existence when an agreement is made necessarily enter into, and form a part of it, as fully as if they were expressly referred to and incorporated into its terms." Hence the Pure Food and Drugs Act, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express provision against the delivery of salmon which is adulterated within the meaning of that act.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

IX.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 2, reading as follows:

If you shall find that the salmon in question when the cans were opened, was so badly, or

otherwise, decomposed as to be unfit for human consumption, you are entitled to believe and find [169] that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore, prohibited.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

X.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 3, reading as follows:

The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, then its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to \$16,961.30, with interest on \$9821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XI.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, and as an alternative instruction to said proposed or requested instruction No. 3, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 3A, reading as follows:

If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in ignorance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which it is agreed amounted to \$16,961.30, with interest on \$9,821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from [170] the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 4, reading as follows:

One criterion for determining the edible character of an article prepared in an hermetically sealed can for human consumption is its condition at the time the can is opened for such consumption; for "The condition of the product in the hands of a consumer is the place and time to test its fitness for food."

If it is then either filthy, decomposed or putrid, its condition is such as to make its importation into this port a violation of law, both state and national, and its sale a void transaction; for a sale prohibited by law is void. If, therefore, you shall find that a substantial part of the cans of salmon in question, when opened, were filthy, decomposed or putrid, then you should find that the salmon was adulterated within the meaning of the law when it was originally brought into this port. Its sale therefore, being void, plaintiff is entitled to recover the amount paid to defendant for the salmon, with interest thereon from the time of payment to the time when your verdict is rendered.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 5, reading as follows:

A shipper of merchandise prohibited by the Pure Food Acts is responsible for the act of sending, even although he may be wholly unaware of the condition of the article shipped, or may have nothing to do with such condition except as possession or ownership of the article makes him responsible. [171]

Ignorance by a packer or manufacturer of the unfitness for human consumption of an article packed or prepared by him, like ignorance of the law, does not excuse him, or make valid a transaction otherwise invalid.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIV.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 6, reading as follows:

You are further instructed that when anyone sells an article of any kind, "Although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it."

This is especially true in view of the state and federal Pure Food Acts. This rule rests “upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as ‘the purchaser cannot be supposed to buy goods to lay them on a dung hill,’ * * * it will not be assumed that the seller desires to obtain money for a worthless article. * * * So that, upon this issue, after considering all the evidence, if you find” therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time.

This exception is also designated in said bill of exceptions as Plaintiff’s Exception No. 8. [172]

XV.

The said District Court erred in refusing to give to the jury, as a part of said Court’s charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 7, reading as follows:

The contract made between the parties to the suit provided, among other things, that the “Archer” brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins

were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this State, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those acts, even if plaintiff did not inspect the salmon before taking delivery.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XVI.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 8, reading as follows:

I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than "do-over" salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representations so made by defendant concerning it, or with the samples furnished by defendant to plaintiff, but was unmerchantable, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that in-

spection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery can be had by plaintiff, since defendant by its conduct, in such event, is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff.

This exception is also designated in said bill of exceptions [173] as Plaintiff's Exception No. 8.

XVII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 9, reading as follows:

I further charge you that by the contract in suit defendant warranted that the "Archer" brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of "Archer" brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XVIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 10, reading as follows:

You are not concerned with the determination of the question as to whether or no a "do-over" salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in controversy was purchased warranted that this salmon, no matter what the general character or reputation of "do-over" salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.

You are therefore, only concerned with the determination of the question: Was the Archer brand pack of 1912 delivered to plaintiff by defendant equal in quality to the Archer brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the fall of 1912 suitable for human consumption? [174]

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIX.

The said District Court erred in directing a judgment to be rendered and entered in favor of the plaintiff in the sum of \$1.00 damages, by reason of

the fact that the evidence introduced in the case shows that plaintiff was damaged in a sum in excess of said amount.

XX.

The verdict of the jury and the said judgment of the District Court entered thereon are contrary to said evidence in this respect that said evidence shows that the salmon herein involved was unfit for human consumption at the time it was transported from Alaska to San Francisco, California, and delivered to plaintiff.

XXI.

The said verdict of the jury and said judgment entered thereon are contrary to said evidence in this respect that said evidence shows that by reason of the inedible condition of said salmon at the time of its transportation and delivery to plaintiff, there was an utter failure of consideration furnished by defendant to plaintiff for the payment by plaintiff to defendant of the sum of \$16,961.30.

XXII.

The said verdict of the jury and said judgment entered thereon are contrary to said evidence in this respect that by reason of the inedible condition of said salmon at the time of its transportation and delivery to plaintiff, the latter was damaged in a sum in excess of said amount of \$16,961.30.

SAMUEL KNIGHT,
F. T. BOLAND,

Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount of
Bond.**

Upon motion of Samuel Knight, attorney for the plaintiff, American Trading Company (Pacific Coast), a corporation, and upon filing a petition for a writ of error, and an assignment of errors,

IT IS ORDERED that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein on the 11th day of October, 1916, and that the amount of bond on said writ of error be, and the same is hereby fixed at the sum of Five Hundred (\$500) Dollars; said bond to serve as a cost bond and a supersedeas bond on said writ of error.

Dated April 3, 1917.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, American Trading Company (Pacific
Coast), a corporation, as principal, and C. R. Morse
and F. E. Reade, as sureties, are held and firmly
bound unto North Alaska Salmon Company, defend-
ant in the above-entitled action, in the full and just
sum of Five Hundred (\$500) Dollars, lawful money
of the United States, to be paid to the said defend-
ant, North Alaska Salmon Company, to which pay-
ment well and truly to be made, we bind ourselves
and each of us, jointly and severally, and our and
each of our heirs, executors, administrators, suc-
cessors and assigns firmly by these presents.

Sealed with our seals and dated this third day of
April, 1917.

WHEREAS, the above-named plaintiff, American Trading Company (Pacific Coast), a corporation, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered on the 11th day of October, 1916, in the District Court of the United States for the Northern District of California, Second Division, in the above-entitled action in favor of the plaintiff therein for \$1.00 damages.

NOW, THEREFORE, the condition of this obligation is such [177] that if the above-named American Trading Company (Pacific Coast), a corporation, shall prosecute such writ of error to effect, and answer all damages and costs if it shall fail to make good said plea, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said American Trading Company (Pacific Coast), a corporation, has caused its name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its proper officer thereunto duly authorized, and said C. R. Morse and F. E. Reade have hereunto set their hands and seals this third day of April, 1917.

AMERICAN TRADING COMPANY
(PACIFIC COAST),

By C. R. MORSE, Secretary.

C. R. MORSE, Surety.

F. E. READE, Surety.

[Seal American Trading Co.]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. R. Morse, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a resident of the county of Alameda, State of California, and is a freeholder within said state; that he is worth the sum of Five Hundred (\$500) Dollars, mentioned in the above bond, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

C. R. MORSE.

Subscribed and sworn to before me this third day of April, 1917.

[Seal]

JOHN E. MANDERS,
Notary Public in and for the City and County of San
Francisco, State of California. [178]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

F. E. Reade, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a resident of said City and County of San Francisco, State of California, and is a householder within said state; that he is worth the sum of Five Hundred (\$500) Dollars, mentioned in the above bond, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

F. E. READE.

Subscribed and sworn to before me this third day of April, 1917.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of
San Francisco, State of California.

Approved.

WM. M. MORROW,
United States Circuit Judge.

[Endorsed]: Filed April 3d, 1917. Walter B.
Maling, Clerk. [179]

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-
trict of California.*

Clerk's Office.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

Praeipice for Transcript of Record on Writ of Error.

To the Clerk of Said Court:

Sir: Please incorporate in the transcript the fol-
lowing:

Amended Complaint; Demurrer Thereto; Answer
Thereto; Order Overruling Demurrer in Part and

208 *American Trading Company (Pacific Coast)*
Sustaining Demurrer in Part; Bill of Exceptions;
Verdict of Jury; Judgment Entered Thereon; Original Writ of Error; Petition for same; Order allowing same; Bond; Assignment of Errors, Citation.

4 April, 1917.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 5, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [180]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred eighty (180) pages, numbered from 1 to 180, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the prae-

cipe for record on writ of error, as the same remains of record and on file in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$110.80; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States, in
and for the Northern District of California.
[181]

*In the District Court of the United States for the
Northern District of California, Second Di-
vision.*

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC
COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Cor-
poration,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable
the Judges of the District Court of the United
States for the Northern District of California,
Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between American Trading Company (Pacific Coast), a corporation, plaintiff, and North Alaska Salmon Company, a corporation, defendant, a manifest error hath happened to the great damage of said American Trading Company (Pacific Coast), a corporation, plaintiff, as by its complaint appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, on the 30th day of April, 1917, [182] in the said United States Circuit Court of Appeals for the Ninth Circuit to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM W. MORROW, United States Circuit Judge, designated to sit in the United States District Court for the Northern District of California, this 3d day of April, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the
Northern District of California.

By _____,
Deputy Clerk.

Allowed by:

WM. W. MORROW,
United States Circuit Judge. [183]

Due service and receipt of a copy of the within Writ of Error, and Order Allowing Writ, Citation, Assignment of Errors, and Bond on Writ of Error, is hereby admitted this 3d day of April, 1917.

WISE & O'CONNOR,
Attorneys for Defendant.

[Endorsed]: No. 15,744. In the District Court of the United States, Northern District of California, Second Division. American Trading Company (Pacific Coast), a Corporation, Plaintiff, vs. North Alaska Salmon Company, a Corporation, Defendant. Writ of Error. Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk. [184]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.
North Alaska Salmon Company, a Corporation, Defendant, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to a Writ of Error allowed and filed in the clerk's office of the District Court of the United States for the Northern District of California, Second Division, wherein American Trading Company (Pacific Coast), a corporation, is plaintiff in error and you are defendant in error, to show cause, if

any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM W. MORROW, United States Circuit Judge, this 3d day of April, 1917.

WM. W. MORROW,
United States Circuit Judge. [185]

[Endorsed]: No. 15,744. In the District Court of the United States, Northern District of California, Second Division. American Trading Company (Pacific Coast), a Corporation, Plaintiff, vs. North Alaska Salmon Company, a Corporation, Defendant. Citation. Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2974. United States Circuit Court of Appeals for the Ninth Circuit. American Trading Company (Pacific Coast), a Corporation, Plaintiff in Error, vs. North Alaska Salmon Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed April 13, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2974

— IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC
COAST) (a corporation),
Plaintiff in Error,

VS.

NORTH ALASKA SALMON COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Filed

OCT 2

SAMUEL KNIGHT, F. D. Monckton,
F. E. BOLAND,

Attorneys for Plaintiff in Error.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC COAST) (a corporation), VS. NORTH ALASKA SALMON COMPANY (a corporation),	<i>Plaintiff in Error,</i> <i>Defendant in Error.</i>
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BRIEF FOR PLAINTIFF IN ERROR.

This is an appeal from a judgment of the District Court of the United States for the Southern Division of the Northern District of California, Division No. 2, entered in the above case on the verdict of the jury in favor of the plaintiff in error but assessing only nominal damages (Trans. p. 177). As plaintiff in error and defendant in error occupied corresponding relations in the court below, they will be hereinafter designated as plaintiff and defendant, respectively. The evidence in the case is remarkably free from contradiction, which has facilitated the abbreviation of the record on appeal, and it establishes the following facts:

Statement of the Case.

For a number of years prior to the occurrence of the transaction which occasioned this suit, plaintiff, which was engaged in the business of a jobber of salmon, had purchased, deliverable in San Francisco, among other commodities, large quantities of "Archer" brand do-over salmon, from defendant, which was engaged in Alaska in packing salmon and shipping it to market. Invariably defendant had furnished plaintiff with samples of the salmon to be delivered each year prior to delivery, and not only had these samples consisted of salmon which was merchantable and perfectly edible, but also the bulk of the salmon had conformed to the samples and proved edible and eminently satisfactory to the trade.

"Do-over" salmon, so-called, is salmon which has been re-processed, i. e., re-cooked, because of the discovery of a leak in the can when it was originally cooked. If so re-processed within a very short time after the original cooking, it is perfectly edible, provided the contents, when originally put into the can, were edible and the can was sound; but if the salmon is suffered to remain in a leaky can a certain length of time before being re-processed, bacterial action causes decomposition to set in, which spoils the fish. If this spoiled fish is afterwards properly sterilized in the cooking and then canned the spoilage is arrested but the fish still remains spoiled and unedible; if insufficiently sterilized, the process of decay is accelerated. Of course, the cans

are hermetically sealed. Do-over salmon does not otherwise differ from salmon which is known as standard, but sometimes in the re-processing, salt water is added to the can to make up for the loss of juice from the fish caused by the leak in the tin, and sometimes juice derived from boiling the heads of salmon supplies the missing liquor in the tins. This, however, does not in any way affect the edibility of the fish. Nowadays, but very little do-over salmon is put on the market by reason of the use by packers of the sanitary can instead of the old fashioned solder can that was in use by defendant and others during the time herein referred to; and at the time of the transaction in question and for a number of years theretofore, despite defendant's attempt to show that do-overs should be treated with suspicion (Trans. pp. 145, 146, 152), it was shown that they were considered a perfectly legitimate article of commerce, so recognized by the U. S. Government, and in large quantities had been bought and sold in the market for human consumption at prices somewhat less than standard salmon of the same quality brought (Trans. pp. 44, 45, 48, 54, 66, 69, 91, 114, 116, 117).

In 1911, defendant packed and sold to plaintiff three thousand cases of this "Archer" brand do-over red Alaska salmon (red Alaska being the best quality of Alaska salmon offered to the trade), and they proved to be no exception to the previous years' packs of the same brand and grade of salmon, only fifteen cases, i. e., one-half of one per cent

being spoiled. That fall the parties hereto entered into the contract in controversy, providing, in part, for the supply of the same quality and grade of salmon for the following year, and reading as follows:

“San Francisco, Cal., Nov. 16th, 1911.

The North Alaska Salmon Company, of San Francisco, California, have sold and the American Trading Company (Pacific Coast) of the same place have bought all of the seller's 1912 season's pack of the following grades and brands of salmon:

No. 2 Grade of Red Alaska Salmon, labeled 'Polar King'.

Do-over Grade of Red Alaska Salmon, labeled 'Archer'.

It is understood that the quantity sold shall not exceed three thousand (3000) cases of 'Polar King' brand and five thousand (5,000) cases of 'Archer' brand.

Price of the 'Archer' brand to be eighty-five cents (85¢) per dozen, Net Cash, f. b. o. [sic] San Francisco, Cal.

Price of the 'Polar King' brand to be twenty cents (20¢) per dozen less than the North Alaska Salmon Company's price, in car lots, of No. 1 Red Alaska Salmon, f. o. b. San Francisco, Cal., Net, without the cash discount, when delivered.

Delivery is to be made within thirty days after arrival of vessels from Alaska and goods to be paid for on presentation of warehouse receipt or delivery documents.

'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature will be allowed.

Sellers guarantee 'Polar King' brand against swells and rusty tins but otherwise goods to be

taken 'as is', and no claim of whatever nature is to be made against seller after delivery.

Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack.

The salmon under this contract is sold subject to being packed and safely landed in San Francisco.

It is understood that the 'Polar King' label is the property of the buyer and solely under their control. But if for any reason whatsoever the buyer does not take delivery of this purchase within thirty (30) days after arrival, as above specified, then the sellers may dispose of the same at a price which is less than that named in this contract, buyer to reimburse seller for the difference.

NORTH ALASKA SALMON COMPANY,
J. P. Haller, Manager.

AMERICAN TRADING COMPANY
(PACIFIC COAST),

C. R. Morse, Secretary,

A. B. Field,
Witness."

The delivery of this salmon was preceded in October, 1912, by the furnishing, as usual, of what purported to be samples of the entire lot of do-overs, consisting of a case or two, each case containing four dozen cans. A number of these cans were opened by plaintiff, examined and all found to contain salmon which was merchantable, perfectly sweet and edible and equal in quality to the 1911 pack. When the samples were obtained defendant's manager, Mr. Haller, informed Mr. Field, manager of plaintiff's canned goods department, that the quality of this salmon was "superior to any-

thing he had ever packed or presented to us [plaintiff] and that we should obtain full prices for the same * * * ” (Trans. pp. 47, 48). “Mr. Haller’s assurance [was] it was the finest lot of salmon he had ever packed” (Trans. pp. 64, 65). Thereupon plaintiff sent to certain of its eastern customers some of the samples which it had thus received and on them it obtained orders for large quantities of the salmon. In consequence of the result of its examination of these samples and of Mr. Haller’s representations concerning it, plaintiff in the latter part of October or early November, without then examining or even seeing the bulk of the salmon, which was in the Mission Rock Warehouse, where it had been landed by defendant on its arrival in San Francisco, took delivery thereof by directing defendant to ship nine hundred cases of it to Chicago, Illinois, one thousand cases to St. Louis, Missouri, and one thousand cases to Louisville, Kentucky, and thereupon paid to defendant the sum of \$16,961.30, which was the full purchase price for the entire lot of salmon, in two installments, i. e., \$9,821.30 on November 18, 1912, and the balance, \$7,140.00, eight days later.

The remaining 2,100 cases remained in the warehouse to be put on the market in due season, and they were transferred to plaintiff on the warehouse books November 26, 1912 (Trans. p. 151).

The answer alleges that on the arrival of the salmon at San Francisco defendant overhauled the “Archer” brand and removed therefrom all swells

and rusty tins (Trans. p. 30), and one of defendant's employees testified that he overhauled this salmon at the warehouse, separating the rusty tins and swells and light cans from the remainder (Trans. p. 158). It also appears that shortly thereafter 190 cases of this salmon were dumped overboard by the warehouse under defendant's orders (Trans. pp. 150, 151) prior to the time when delivery of any of the salmon was made to plaintiff.

Immediately after the arrival of the salmon at the various eastern places to which it had been consigned and at a number of other places to which it was being distributed therefrom by grocery stores in the normal course of business, the contents of can after can of this salmon, which had been opened for consumption, and from external appearances indicated that the salmon was sound and edible, were discovered to be sour, putrid and rotten. This led to a more general examination of the salmon in stock at the various eastern stores with startling results.

We quote some of the eastern testimony on the subject.

Frost, of Chicago, who has handled canned fish of various kinds for thirty years, including the entire 1911 pack of "Archer" brand do-over salmon, and to whom 900 cases of this 1912 pack had been consigned shortly after its arrival at San Francisco (Trans. p. 114), testified:

"We drew some samples from the consignment. From these samples we cut some samples

running as high as 6 out of 10 cans absolutely unfit for food. They were so bad you wouldn't care to stay in the room after they were cut; some of them were absolutely dry and others were very soft. I presume we cut 100 or more cans selected at random from various cases; I would say that the salmon would run at least 35 to 50 per cent absolutely unfit for food. The original examination was made in the latter part of February, 1913; and from that time on we tried to sell to various people. Before March 1st on one occasion I cut 10 cans and found 7 of them bad—unfit for food. April 1st I personally drew 25 samples of the salmon; I found 8 cans that were first-class; 7 would pass without serious criticism, although 2 of them were very dry, 11 of them bad, 8 of them so bad that when we cut them we had to put them out of the office immediately. * * * After we discovered the condition of the salmon we notified the shippers and to protect ourselves we notified the Health Department of the City of Chicago."

Armstrong, Chief of the Bureau of Food Inspection in Chicago, testified that he ordered this salmon to be condemned as unfit for human consumption as the result of his examination and the analysis of the city chemist. "The goods were in a condition of putrefaction" (Trans. p. 118).

Costello, Food Inspector of the Health Department of that city, said that the salmon was putrefied and in selecting their samples the department did not take any swells "as they condemned themselves". He testified that the proportion of samples examined that were unfit for consumption was about 80 per cent (Trans. p. 119).

Creasey, who did the buying for certain wholesale grocery houses in the Mississippi Valley (Trans. p. 120), said that he examined some of these cans belonging to another consignment of the "Archer" brand salmon and he remembered finding just one that was good. "The salmon was spoiled, bad, smelly, looked mushy" (Trans. p. 121); and he testified that he had never had any trouble with do-over salmon before (Trans. p. 122).

Hayes, who was manager of a grocery house in Evansville, Indiana, testified that more than 75 per cent of the cans he examined were bad, including some swells, "none were good" (Trans. p. 122).

Similar testimony was given by Harker, manager of a grocery company at St. Louis (Trans. p. 123), with reference to another consignment of the salmon.

Dummeyer, who was the cashier of the same grocery company, found that one-half to two-thirds of the several dozen cans which he opened were decayed and rotten, saying "there were only about five, or at the most, ten per cent of the people who did not object, did not send it back" (Trans. p. 124). None of the salmon which he examined consisted of swells, and "cans that appeared to be good burst open on the shelves in the stock room; some of them within a month's time, with a very bad odor" (Trans. p. 125).

A Deputy United States Marshal testified, in part, that in carrying out the order of the court

in one of the condemnation proceedings hereinafter referred to, he

“then opened some of those cans and the odor was something fierce. I destroyed the salmon by fire Sept. 29, 1913, pursuant to order of court. Before doing so I opened two of the cans; they were simply rotten. When I started the fire the odor was so bad that it ran everybody out of the dump. There was a horrible stench. There was a bad odor before we began burning them” (Trans. p. 126).

Further testimony regarding the horrible character of the salmon was given by the bookkeeper of a grocery company at Indianapolis, Indiana (Trans. pp. 126-127); and

The manager of the Louisville Grocery Company (Trans. p. 127) testified that he examined a large quantity of the salmon and that about 90 per cent of it “was rotten” and he afterwards turned it over to the city health authorities of Louisville (Trans. p. 128).

Fulton Gordon, a salmon broker of Louisville, added to the cumulative testimony on this point (Trans. p. 129), and the City Chemist and Bacteriologist of Louisville testified that on December 19, 1913, he examined 30 samples of the salmon and found 90 per cent of it “unfit for human consumption”, including a number of swells caused by germ development and bacteria (Trans. pp. 130-131).

A Deputy United States Marshal for the Western District of Kentucky, who was made the custodian of some of this salmon after it had been seized by

the Government, testified that when destroyed it was unfit for human consumption (Trans. p. 131).

Naturally, complaints poured in from these and other eastern sources to plaintiff regarding the condition of the salmon, which led plaintiff to make an examination of the 2100 cases stored in the warehouse in San Francisco. Without opening each tin it was impossible to determine whether or not the contents were edible, except in a few instances where gas, caused by air entering the can where there was a small hole insufficient in size to allow the gas to escape, or insufficient sterilization, had caused one end of the can to bulge out and thereby show that the contents were decomposing. The examination of the warehouse salmon necessitated the opening, therefore, of a great many cans selected in such a way as to be fairly representative of the condition of the bulk of the salmon, and this examination was made by three men, including a professional overhauler of canned salmon. The first examination was made in February or March, 1913, and disclosed that about 25 per cent of the salmon was "rotten", as Mr. Field, the manager of plaintiff's canned goods department, expressed it (Trans. p. 51) or "inedible", as Mr. C. R. Morse, plaintiff's secretary, rather euphemistically testified (Trans. p. 81). This was followed by a second examination, which occupied several weeks, and showed that over 30 per cent of the salmon, excluding swells and rusty tins, was rotten (Trans. pp. 52, 82). Thereupon the Federal authorities seized the stuff and libeled it as

contraband and adulterated under the Congressional Pure Food and Drug Act, approved June 30, 1906. One of the witnesses whom the Government called to prove the condition of the fish, Mr. Frank D. Merrill, a chemist employed in the United States Food and Drug Inspection Service in San Francisco and of conceded ability and standing, testified (Trans. p. 70) that he examined the salmon in July, 1913, and found 39 per cent of the cans contained

“salmon that was unfit for human consumption. The outward condition of the tins which I examined appeared to be in good condition. I did not examine any swells. I could not tell from the outside of the tins what was the condition of the contents.”

He made his test by the use of the five senses.

“It was self evident when the tins were open what the condition of the contents was. The 39 per cent of the salmon was in various stages of decomposition, some of it very putrid and in some cases it was sour, sour smell and in others it might be termed as very stale, a condition such that it would be unfit for food. * * * If food is properly canned and kept in proper condition as to temperature, it will keep for a number of years” (Trans. pp. 70, 71).

A regularly appointed food and drug inspector of the United States Department of Agriculture testified in the present case that he had taken samples of this salmon from the warehouse, excluding therefrom any cans that gave evidence of swells or whose outward condition indicated that the contents were not good (Trans. pp. 73, 74), and that

some of these cans had been sent to the Seattle laboratory of the United States Government on the 26th of December, 1913 (Trans. pp. 84, 85). An examination of 48 of them made there by a Government expert showed that

“16 were actually spoiled, 12 cans were more or less soft and stale, showing incipient decomposition, 15 cans were what I would call as passable and 5 of the tins were good. There were one swell and one leak among the bad tins. The leaky cans did not have a vacuum, the others did. Other than those two cans there was no external indication of damage” (Trans. pp. 85-86).

The swelled condition of the salmon was, in his opinion, caused by “spoilage” before the tins were last sealed and sterilized” (Trans. p. 87).

Furthermore, the complete original record of the suit brought by the Government against the 2100 cases of warehoused salmon, tried in the same court which tried the instant case and showing the condemnation of the entire lot as adulterated within the meaning of the Pure Food and Drug Act of Congress at the time of its importation into San Francisco and its delivery to plaintiff, was offered by the latter and refused admission as evidence, apparently on the ground “that the defendant was not a party to that proceeding” (Trans. p. 97), although the due publication of the monition gave notice to the world, including defendant, of the pendency of that case. Duly certified copies of similar condemnation proceedings brought, respec-

tively, against other portions of this salmon shipped east, in the United States District Court for the Eastern Division of the Western Judicial District of Missouri, the United States District Court for the Southern District of Illinois, Northern Division, the United States District Court for the District of Indiana and the United States District Court for the Western District of Kentucky, all terminating in decrees for the confiscation and destruction of different lots of this salmon because it was unfit for human consumption, were likewise offered by plaintiff and refused admission as evidence, apparently on the same ground.

Between the Federal authorities acting under Decrees of Condemnation rendered in these Courts, and the City Health authorities of Chicago, Illinois, and Louisville, Kentucky, respectively, over 4000 cases of the salmon in question were destroyed.

On behalf of defendant, one dealer in canned foodstuffs, who had never dealt in this brand of salmon nor handled any do-overs packed by defendant, testified that "a large number of cans will be bad in re-processing or re-cooking, no matter how careful the canner is" and that the do-over was known as a "speculative possibility" (Trans. pp. 145, 146); and another witness who was in the merchandise brokerage business, including canned salmon, said, when called by defendant, that any one buying do-overs "takes chances" (Trans. p. 152). Hale, one of defendant's witnesses, testified that in 1912 and for a number of years theretofore, he

has supervised for defendant the pack of salmon in its four Alaska canneries, that there was no change in the method of packing during that time, and that "the condition of the do-over salmon as to *quality* in the summer of 1912 was just the same as the 1911 pack" (Trans. pp. 146, 147). He further testified that do-overs were not permitted to and did not stand more than three days before being re-cooked, "*so far as I know,*" and that there was no difference in the degree of care in handling the salmon at the various canneries of defendant between that year's pack and the pack of previous years. He also testified that he drew the samples of the salmon for plaintiff indiscriminately without attempting to pick out any particular cans for sample purposes and admitted that the Pacific Coast pack in 1912 was over a million cans in excess of the pack of the previous year, though the number of employees at defendant's canneries had not increased. It appears from his testimony that he only knew in a general way what was going on at the canneries, inasmuch as he was obliged to make the circuit of them by water, only going to the smaller canneries two or three times a season, and that the Alaska Red Salmon and do-overs were packed at all of the different canneries (Trans. pp. 146-148). He said: "The only way I have of knowing that the cans to be re-processed have not stood longer than three days, except what the foreman tells me, is to notice whether or not the number of such cans has increased

from time to time" (Trans. p. 148). The defendant finished packing the salmon in the latter part of July, 1912 (Trans. p. 149).

Julius Phillips, called on defendant's behalf, said that Getz Brothers handled some of the 1912 pack of "Archer" brand do-over salmon, sold it to the trade and had no complaints about it (Trans. p. 157).

Another witness for the defendant testified that he was a foreman of one of defendant's four canneries in 1912, and that they never allowed salmon to stand over a couple of days before re-processing it (Trans. p. 158).

Defendant's Chinese boss, who worked at the same cannery, testified that he had a contract to mend leaks, and that if he put up salmon that was "no good" he was charged \$1.50 a case and there was no charge made against him for 1912, because everything was good that year as it was in 1911 (Trans. p. 159). He does not appear to have been present at all of defendant's canneries, but according to one of defendant's witnesses (Trans. pp. 150, 151), the boss should have been charged with \$1.50 a case on at least 192 cases of admittedly bad do-over salmon.

Another witness, who was employed as a superintendent at another of the defendant's smaller canneries, testified that defendant used the same process in packing "Archer" brand do-over salmon in 1912 as it did in 1911. "We do not allow do-overs to stand at all if we can help it; sometimes they

stand probably from 36 to 40 hours. That has always been the rule. They did not stand any longer in 1912 than in any other year" (Trans. p. 159).

There were other canneries where this do-over salmon was being packed by defendant (Trans. p. 160), but no testimony was offered regarding the manner of re-processing the salmon there.

This testimony on behalf of the defendant is largely negative in character, i. e., that at *some* of the canneries do-over salmon was not permitted to remain more than a limited time without being re-processed. The testimony on behalf of the plaintiff on the subject was affirmative, positive and overwhelming, to the effect that within a short time after the salmon had reached San Francisco and had been delivered to plaintiff, it was found to be, in great part, unfit for human consumption.

Said the Circuit Court of Appeals for the Third Circuit in the case of *U. S. v. 443 Cans of Frozen Egg Product*, *post*, at p. 593, in referring to testimony tending to show that a certain foodstuff was decomposed:

"Unless in some way counteracted, this testimony would seem conclusive of the fact that this product was decomposed. This it is sought to do on several grounds: First, that other samples taken from the same cans were tasted, smelled and cooked by the claimant's witnesses, without any odors or other evidence of the decomposition being discovered. But this testimony, while it is persuasive as to the particular samples used by claimant's witnesses, is at best but negative, and does not disprove the positive

and affirmative evidence as to the foulness of the samples used by the Government witnesses.
 * * * To us it is clear that testimony of the limited, negative character referred to above cannot avail to counteract and discredit the strong positive proof of decomposition found in the testimony of those who testified thereto."

The query naturally arises, When did the salmon get in this condition? Upon this point the testimony is all one way without any contradiction whatsoever. It must be first borne in mind that fish, like other food, if properly canned and kept in proper temperature will keep for many years, or "indefinitely", as some witnesses expressed it (Trans. pp. 52, 53, 71, 96).

In this connection, a misprint on page 85 of the Transcript of Record should be noted. The word "an" before the words "artificial heat" should read "no".

Merrill, a Government chemist of high standing, said that the 39 per cent of the warehoused "Archer" brand salmon which he found inedible, was, in his opinion, in that condition at the time it was last processed and was decomposed before it left the cannery. Said he further:

"Decomposition does not progress after sterilization in hermetically sealed cans. That entirely stops decomposition at that point. Sterilization does not remove smell. If it is in a hermetically sealed tin the smell stays right there. The point I am trying to make is this: that if a fish is rotten, or is in the process of rotting when put in the tin and the tin is sterilized, that then decomposition stops at that

point, that is, your finished product is in exactly the same condition as to decomposition that it was when it was last processed. Now, of course, processing makes a difference physically in the texture. You cook that fish and there is a physical difference there, but speaking from the standpoint of decomposition, the condition as to decomposition is exactly the same after processing as it was before, because decomposition stops. The decomposition is caused by bacterial growth and they are killed by the processing, that is, if it is completely sterilized; if it is not completely sterilized and decomposition does continue, then you have got a swelled tin. I am speaking of these tins, none of which were swelled" (Trans. p. 72).

He examined no swells (Trans. p. 70).

Hilts, who examined the salmon in the Seattle laboratory of the Department of Agriculture in January and April, 1914, and who, previous to his employment in the Government service, had been connected with Armour & Co. for several years assisting in their investigations connected with the canning of meats, agreed with Merrill, saying that the fish was spoiled before the tins were last sealed and sterilized. He testified that the swelled tins occurred through the process of decomposition that was going on in the can by action of the bacteria.

"All the spoiled ones wouldn't swell because some of them had been sterilized after they spoiled, thereby killing the bacteria and preventing the further evolution of gas and thereby the can retained its vacuum which it had at the time it was put into it. The cans that were not swelled contained material that was originally spoiled when the cans were

finally re-processed; decomposition was not proceeding any further, but decomposition was proceeding in the tin that was swelled and producing a gas."

The meat in the cans had commenced to decompose before the cans were last sealed and sterilized because they were not swelled. Never had he known of a swell developing in salmon a year and a half after it was packed. Incipient decomposition in some of the cans that witness examined was checked by sterilization and had not progressed since. The 16 cans that the witness pronounced bad had been permitted to spoil before the last processing was done. He said that if all the bacteria were not killed in the cooking process, decomposition might develop in a hermetically sealed can. The bacteria in fish are presumed to be killed by application of heat in the cooking process (Trans. pp. 87-90).

Hart, Chief of the Western Division of the United States Bureau of Chemistry in the Department of Agriculture, who has made a thorough study of almost all of the canning that is done in this country, testified that the salmon was either in bad condition at the time it was canned or was in good condition and improperly processed and canned or was in good condition and properly canned and then by some accident to the cans air was admitted with bacteria and other contaminating elements (Trans. p. 91). No accident appears to have happened to any of the cans.

Swift, a canner of long experience and who formerly built and operated a cannery of his own, testified on the subject:

“If a can of do-over salmon was found in a bad state of decomposition when the can was opened, say a year after it was packed, I would say that it was in that condition when the can was mended and hermetically sealed, must have been decomposed at that time; it would not decompose any more after it was sterilized by cooking and hermetically sealed” (Trans. p. 96).

Finally, Dr. Schneider of the University of California, who has taught bacteriology for 25 years, is employed in the State Food and Drug Laboratory and has had experience for the same length of time in the examination of canned food products, including salmon, testified with considerable degree of particularity regarding the decomposition of fish (Trans. pp. 132-135), saying that under the conditions brought out in this case there was an improper processing of the salmon or the use of decomposed material at the time the salmon was canned, and that under ordinary conditions decomposition sets in immediately, followed by inedibility as soon as the temperature after the cooking is sufficiently reduced. Decomposition then proceeds slowly or rapidly, depending upon temperature conditions largely. In his opinion, from the conditions existing in this case, the salmon was rotten when it was sterilized. On cross-examination, he testified that canned salmon properly processed will not produce a swell whether there are seeds of decom-

position in it at the time of sterilization or not; and if a large number of swells develop after the processing, it indicates that the sterilization was not such as to arrest the decomposition that had set in. He said further that it was evident that decomposition had set in at the time of shipment. Decomposition does not proceed after sterilization but sterilization does not remove the decomposition; and salmon defectively processed and hermetically sealed will become inedible in a few days even at a normal temperature.

It is interesting to note in connection with his testimony that a bacteriological and microscopic examination of the salmon would have shown from 25 to 100 per cent more defective salmon than the organoleptic tests, or tests by the senses, employed by several of plaintiff's witnesses (Trans. pp. 132-133).

Defendant offered no testimony as to the condition of the salmon after it had been canned, or as to the cause of its putrid condition; and it is in evidence that about three months' time elapsed between the time when the packing of the salmon was completed and the time when it was delivered to plaintiff (Trans. pp. 46, 49, 51).

It may be here remarked that the probable reason why defendant was so negligent in putting up the pack of do-overs for the year 1912 was intimated in the testimony of Mr. John S. Hume, one of

plaintiff's witnesses, who said, speaking from practical experience as a canner:

“What is done” in the re-processing of salmon “depends upon the amount of work that is necessary to be done in the cannery, how much fish there are on hand; if there are a great many fish the can is set aside; ordinarily if there is not much fish in the cannery the can is taken to the mender's bench and it is then re-mended and re-cooked” (Trans. p. 76).

And one of defendant's witnesses intimated that in a heavy run of fish the men and the cannery get behind in their work (Trans. p. 154). Now, as we have heretofore observed, there was an increase of over 1,100,000 cases, i. e., about 40 per cent, in the Pacific Coast salmon pack of 1912 over that of 1911, with no corresponding increase in the number of defendant's employees to take care of its share of this extraordinary run (Trans. p. 147). The most charitable view, then, to take of defendant's delinquency in the preparation of this salmon for market is that it was unable to properly handle the fish that were caught and brought to its canneries and deferred the re-processing of the do-overs until the fish had commenced to spoil.

We have thus dwelt somewhat at length upon the principal facts of the case to show that beyond the peradventure of a doubt, and without any contradiction whatsoever, the do-over salmon delivered to plaintiff in 1912 was decomposed in great part, and hence inedible, commercially worthless and a

contraband article of commerce within the provisions of the Federal and State Pure Food Acts.

Furthermore, for this salmon defendant took plaintiff's money and not only gave it nothing of value in return therefor, but what was far worse, attempted to unload upon an unsuspecting market foodstuff in such a dangerous condition that but for plaintiff's prompt action it might have been fatal to more than one consumer; and defendant's manager expressed no surprise when he was told of the complaints which had been received from plaintiff's customers, but simply declined to consider any claim whatever (Trans. p. 51).

With these facts before us, we have a word or two to say with reference to the pleadings before discussing the specifications of error.

The Pleadings.

The theory of the plaintiff is and was that, as expressed in its amended complaint, having entered into, with defendant, a valid and enforceable contract for the sale and delivery by the latter to it of 5,000 cases of "Archer" brand salmon for human consumption, and defendant having, without knowledge thereof by plaintiff, shipped from Alaska and delivered to the latter at San Francisco, an inedible, contraband and utterly worthless article of food in violation of the pure food laws of the United States and of the State of California, and of the contract

taken in connection therewith or otherwise, plaintiff received no consideration for the purchase price paid by it therefor (second count), or, as otherwise expressed in the amended complaint (third count), was damaged by the breach of contract by defendant. The first count of the amended complaint in the form of a common count of *indebitatus assumpsit* was demurred to specially and eliminated from the complaint; and, although the second and third counts are almost identical, except that the former alleged a total failure of consideration furnished to plaintiff for the money paid to defendant, and the latter count made plaintiff's damages the gravamen by reason of the defendant's breach of contract to furnish edible salmon, nevertheless defendant's demurrer, variously stated, to the second count was overruled and a similar demurrer to the third count was sustained for some reason which we have not been able to ascertain. The fourth count based upon an estoppel withstood the attack thereon by demurrer. Hence the case was necessarily tried, not upon the theory of damages for breach of contract, although portions of the court's charge seemed to be based upon the third count which was eliminated from the complaint, but upon the theory of a total failure of consideration by defendant which entitled plaintiff to recover the purchase price paid for the spoiled salmon delivered to it, and also upon the theory of an estoppel arising from defendant's conduct respecting the contract, with

which we are, however, for the moment not particularly concerned.

Inasmuch as the defendant received the purchase price of the salmon without giving any consideration therefor, the money so paid may be recovered as money advanced. This point was adjudicated in the case of

S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 304, where the court held that money so paid could be recovered as money advanced

“on the ground that the consideration upon which it was paid had wholly failed”.

In the case of

Smith v. Blandin, 133 Cal. 441, 444, affirming and quoting from the case of

Richter v. Union Land etc. Co., 129 Cal. 367, it was held that

“In all executory contracts the several obligations of the parties constitute each reciprocally the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of Sec. 1689 of the Civil Code”.

See, further:

Maher v. Riley, 17 Cal. 415;

Rose v. Foord, 96 Cal. 152;

S. C. V. Peat Fuel Co. v. Tuck, *supra*;

Russ Lumber & Mill Co. v. Muscupiabe Land and Water Co., 120 Cal. 521; 65 Am. St. Rep. 186, 191;

Bank of Commerce v. Ruffin, *post*;
Keller v. Hicks et al., 22 Cal. 457; 83 Am.
 Dec. 78;
Aultman-Tailor Co. v. Trainer, (Ia.) 45 N. W.
 757;
Toledo Saving Bank v. Rathmann, 43 N. W.
 193;
Brown v. Weldon et al., (Mo.) 13 S. W. 342;
Hecht v. Wright, (Colo.) 72 Pac. 48;
State v. Smith, (Ohio) 68 N. E. 1044;
Crossman v. Lurman, *post*.

The plaintiff may confine his remedy to the recovery of the consideration paid by him to defendant for the salmon.

Richter v. Union Land etc. Co., *supra*.

The court said in the case of

Minor v. Baldrige, 123 Cal. 187, 191:

“The action is not based upon a breach of contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is, that the money was obtained upon a false representation that it had become due under the contract, by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event, the corporation may yet perform and become entitled to demand and enforce payment from plaintiff.”

In the case of

Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 570,

the court said that it must not be forgotten that an

“action [for the recovery of money paid by mistake] even when in form of a legal action for money had and received, always addresses itself to the equitable consideration of the court”.

If defendant had sued for the recovery of the purchase price of the salmon the court would, under these authorities, have refused to grant affirmative relief, and by parity of reasoning it will refuse a defensive relief to defendant when sued for the repayment of the purchase price.

In the case of

Robinson v. Bright's Executor, 60 Ky. (3 Met.) 30,

it appeared that plaintiff had purchased a slave from defendant's testator who at the time of purchase was diseased, sick and worthless and that plaintiff in ignorance thereof had paid the purchase price. The court first cited the case of *Griswold v. Taylor's Adm'r.*, (Ky.) 1 Met. 228, wherein it was held that under similar circumstances the vendor could not recover the purchase price, and then said:

“Now the question is presented, can money, which has been paid for a chattel of no value when sold, and where there is thus a total failure of the consideration upon which the payment was made, be recovered back?”

We are unable to perceive any difference in principle between the two cases. If it is unjust and unconscientious in the one to coerce the payment of the money, in the other case it is equally against the justice and good conscience to retain the money. In either case the party

is compelled to part with his money without having received any value whatever for it.

And there is ample authority for the recovery back, by an independent action, of money paid upon a consideration believed at the time of the contract and payment to be valuable, but which was in fact, at the time, of no value whatever.

In *Spring v. Coffin*, 10 Mass. 32-35, it was decided that a party who had paid money upon a bargain by which nothing passed to him, had his remedy for the money, 'as paid for a consideration which has failed'. In *Woodward v. Cowing*, 13 Mass. 216, it was said by the court, 'where money has been paid upon a consideration which has failed, it may certainly be recovered back by the party who shall have paid it'. (*Neel v. Deens & Smith*, 1 Nott & McCord, 210; *Wharton v. O'Hara*, 2 Nott & McCord, 65.)

In *Murray & Co. v. Carrett & Co.*, 3 Cal. 373, the same principle was approved by the Court of Appeals of Virginia.

In *Murray v. McFerlan*, 2 Burrows 1012, it was held (opinion by Lord Mansfield) that an action could be maintained for money paid upon a consideration which happened to fail, and the defendant ought, *ex aequo et bono*, to refund.

The same doctrine is recognized by the supreme court of Massachusetts in the case of *Harrington v. Stratton*, 22 Pick. 510, although that was an action by the payee against the maker of a promissory note. (See *Colville v. Besley and others*, 2 Denio 139; 5 Humphreys, 496, *Charlton v. Lay*, opinion by Judge Green.)

In the case now before us it was alleged that the negro, at the date of the sale, was unsound and of no value, and that there was consequently a total failure of the consideration upon which the purchase money had been paid. The pe-

tition stated facts sufficient to constitute a cause of action, and which, if found to be true, would have warranted a recovery by the plaintiff."

The case of

Stone v. Frost, 61 N. Y. (16 Sickles) 614, was brought to recover back money paid by plaintiff as the purchase price of a quantity of grape roots. Plaintiff's evidence tended to show that the roots, when delivered, were dead and perfectly worthless and that plaintiff tendered them back. There was a judgment for plaintiff, which was affirmed. The headnote reads as follows:

"An action can be maintained to recover back the purchase price paid under a contract of sale without proof of warranty or fraud where, upon delivery of the property, it proves to be utterly valueless, and where an offer to return has been made by the purchaser and refused."

In the case of

Hamrah et al. v. Maloof & Co., 111 N. Y. Supp. 509,

it appeared that plaintiffs had purchased laces from defendant and paid for them. They were subsequently confiscated by the United States for the non-payment of customs duty by the defendant. The lower court gave judgment for the plaintiffs for the return of their money, which was affirmed in the appellate division of the Supreme Court.

If it be contended by defendant that plaintiff should have offered to return the salmon, worthless as it was, the case just cited becomes especially

applicable in view of the fact that the major part of the merchandise was seized by the United States Government and destroyed. In that case the court said:

“Equally without merit is the suggestion that the plaintiffs are weak in their case because they have not offered to restore the goods to the defendant. The goods were taken from the plaintiffs because of the wrong committed by the defendant in importing these goods without the payment of duties, and the suggestion that the plaintiffs have failed in any equitable consideration is little less than an impertinence.”

Furthermore, should it be urged on the part of the defendant that plaintiff appeared as claimant in the condemnation suit first hereinafter more particularly referred to the above case becomes also a pertinent authority.

“The appellant urges that as the plaintiffs appeared in the proceeding to condemn the goods, and claimed title to them, it is now estopped to rescind the contract and demand the repayment of its money. But we are of the opinion that the rule invoked has no foundation in reason as applied to this case. The government of the United States reaches the goods. They did belong to the plaintiffs as against all the world, subject only to the right of the government to reach them for the non-payment of duties. The plaintiffs claimed them, notifying the defendant of the claim of the government, and the defendant employed an attorney to defend the goods. How this could operate to estop the plaintiffs to reclaim their money when it was established that the

defendant had failed to pay the duties is not at all clear to us, and we are of the opinion that it is without merit.”

In the case of

Page v. Einstein, 52 N. C. (7 Jones) 147,
the plaintiff purchased from the defendant a note which had been paid, however, before the purchase, and the action was instituted to recover the consideration therefor so paid. In affirming judgment for the plaintiff, the court said:

“A recovery in assumpsit can only be effected where there is a total want of consideration, as where the promise is based upon the sale of a horse that is at the time dead. And a payment made of the purchase money upon such a sale, would be money had and received to the use of the party paying, and might be recovered back, irrespective of any question of fraud.

So, we think money paid for a promissory note, satisfied and extinguished, and which, therefore, has no longer any life as an obligation, stands in the same condition. While the seller of an article of personal property, and likewise, as we suppose, of a chose in action, is not held, in the absence of an express promise, to be liable for defect of quality, yet he is liable if it turn out that the article sold, had no existence at the time, or, that it was a nullity by reason of forgery, or, the like. The liability is not in the nature of a warranty, but rests upon the plain principle of justice, that when something is paid for nothing, through ignorance of facts, the law will reinstate the parties by nullifying the whole transaction.”

The case of

Tyler v. Bailey, 71 Ill. 34,

was an action to recover the purchase price paid for counterfeit land warrants. In affirming a judgment for the plaintiff the court said:

“Appellee paid his money to appellants for genuine scrip, and they delivered to him seven tenths of the amount purchased in counterfeit scrip. Thus the consideration failed to that extent, and, on the failure of consideration, an action accrued to him to recover back the money paid for such scrip. Whether or not the officers of the General Land Office were remiss in not sooner having detected the fact that the scrip was spurious, did not change his right of recovery. The action did not grow out of the rejection of the warrants by the government, or their return to appellee, but from the fact that the consideration had failed for which he had paid his money. Had they been genuine, and they had been returned as spurious, all will concede that no right of recovery would have accrued.

In a suit to recover on a total failure of consideration, the measure of damages is, the money paid, with interest from the day of its payment till the time of recovery. This is believed to be a rule without exception. In fact, we do not perceive how any other just rule could be adopted. Appellee has received no benefit from having received these spurious warrants, he has been deprived of the use of his money, and fair dealing would require that he should, at least, recover it back, with legal interest. It then follows that the court below did not err in telling the jury that the measure of damages was the price paid, with legal interest, from the day it was paid.”

We have thus referred to these cases not only because of their enunciation of the principles under which this case was presented, but also because of the difficulty experienced in convincing the court below on demurrer to the amended complaint that such an action would lie.

Specification of Errors.

I.

UNDER ANY ASPECT OF THE CASE THE VERDICT OF THE JURY IN PLAINTIFF'S FAVOR BUT LIMITING ITS RECOVERY TO NOMINAL DAMAGES WAS CONTRARY TO THE EVIDENCE AND TO THE COURT'S INSTRUCTIONS (Assignments XX, XXI and XXII).

We may, for the purpose of the argument, assume that the defendant will contend that, inasmuch as the contract required defendant to overhaul the salmon and remove all swells and rusty tins therefrom after which there should be no reclamation, and inasmuch as swells were in several instances afterwards found among the bad salmon, and as plaintiff did not in some instances show what proportion of swells there were at that time, and, furthermore, as plaintiff could not recover for any bad salmon which might be classed as swells thereafter, the jury had no evidence before it from which it could find what damage plaintiff had suffered. Defendant's contention, in effect, is:

“I removed all swells and rusty tins before delivery, and while it may be true that, for instance, the United States Government chemist

found, exclusive of swells, 39% of a large portion of the salmon inedible and worthless at the time it left Alaska, yet inasmuch as a few swells developed after delivery, therefore you are entitled to nothing, because you didn't prove how many swells there were."

Such a contention ignores the following:

(1) The importation of the salmon was contrary to law and, being a contraband article, furnished no consideration for the purchase price paid by plaintiff therefor, no matter what may be the technical construction of the contract as to the defendant's non-liability for swells. The testimony is uncontradicted that a substantial part of the salmon was inedible when delivered to plaintiff.

(2) The verdict of the jury, in effect, finds that inedible salmon was delivered to plaintiff but under the court's instruction the jury declares it can not find how much of the damaged salmon was swells and how much was otherwise. The verdict, however, ignores the uncontradicted testimony produced by defendant and the averment in its answer that all swells were removed at the warehouse before the salmon was delivered to plaintiff.

(3) The verdict of the jury, even under the court's instruction, ignores the uncontrovertible testimony of several witnesses, to the effect that a substantial part of the salmon, notably the 2100 cases stored in the Mission Rock Warehouse, was inedible, leaving the swells out of calculation altogether.

(4) The verdict of the jury, even under the court's instruction, ignores the uncontradicted testimony of several expert witnesses that the salmon found inedible by plaintiff and its vendees must have been in that condition when re-processed, and hence was spoiled before it left the canneries.

The question which the jury was preliminarily called upon to decide was, in the language of the Supreme Court of this State, in the case of

Sutro et al. v. Rhodes, 92 Cal. 117,

“Did the plaintiff get what it intended to buy and did buy?”

or

“did it get what it bargained for?”

Bank of Commerce v. Ruffin, (Mo.) 175 S. W. 303.

The salmon was virtually wholly spoiled and was a contraband article of commerce at the time it reached San Francisco in October, 1912, and was not entitled either to be landed here under the *Pure Food and Drug Act of Congress*, approved June 30, 1906,

Chap. 3915 Fed. Stats. Ann. Supp. 1909, p. 135, Secs. 1, 2 and 7, Subs. 5 and 6,

or to become an article of trade or commerce in this State under the Act entitled, “*An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating traffic therein, providing penalties therein, establishing a state laboratory for foods, liquors and drugs, and making appropriation therefor*”, approved March 11, 1907.

Stats. of 1911, p. 208.

The Pure Food and Drug Act of Congress of June 30, 1906, Chapter 3915, provides in Section 2:

“That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court, *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale

for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.”

Section 4 provides for chemical examinations to be made in the Bureau of Chemistry of the Department of Agriculture, and the giving of a notice of adulteration to the party from whom the sample was obtained, the reporting of the results of the examination to the United States Attorney, and the giving of notice by publication of judgment of condemnation in such manner as may be prescribed by the rules and regulations of the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor.

Section 5 provides for the institution of proceedings of condemnation by the United States Attorney.

Section 7 defines what constitutes adulteration, which, in the 6th subdivision thereof, exists:

“If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.”

Section 10 provides for seizure of any matter prohibited by the Act and for its confiscation by libel of condemnation, and also that property so seized shall, if condemned, be destroyed or otherwise disposed of.

The State Pure Food and Drug Act of March 11, 1907, Chapter 181, provides in section 1 that

“the manufacture, production, preparation, compounding, packing, selling, offering for sale or keeping for sale within the State of California, or the introduction into this state from any other state, territory, or the District of Columbia, or from any foreign country, of any article of food or liquor which is adulterated, mislabeled or misbranded within the meaning of this act is hereby prohibited. Any person, firm, company, or corporation who shall import or receive from any other state or territory or the District of Columbia, or from any foreign country, or who having so received shall deliver for pay or otherwise, or offer to deliver to any other person, any article of food or liquor adulterated, mislabeled or misbranded within the meaning of this act, or any person who shall manufacture or produce, prepare or compound, or pack or sell, or offer for sale, or keep for sale, in the State of California any such adulterated, mislabeled or misbranded food, or liquor shall be guilty of a misdemeanor; *provided* that no article of food shall be deemed adulterated, mislabeled or misbranded within the provisions of this act, when prepared for export beyond the jurisdiction of the United States and prepared or packed according to specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if such foods shall be in fact sold, or kept or offered for sale for domestic uses and consumption, then this proviso shall not exempt said article from the operation of any provisions of this act.”

There is in this Act a definition of adulteration similar to that contained in the Federal Act.

It is provided in Section 8 that the possession of any adulterated food by any manufacturer, purchaser, jobber, packer or dealer in food, or broker, commission merchant, agent, employee or servant of any such manufacturer, producer, jobber, packer or dealer, is *prima facie* evidence of the violation of the Act.

The Act further, in Section 9, establishes a state laboratory for the analysis and examination of food and drugs under the supervision of the State Board of Health, and provides for the appointment of a director and an assistant, etc.; and in

Section 10 it provides for examinations and analyses of food, etc.

Provision is made in Section 16 for the notice of adulteration to be sent to parties furnishing samples and of the hearings to follow; and

Section 19 specifies what the duty of the District Attorney is in the premises.

These acts must be taken into consideration in construing the contract, and if any part of the latter contravenes any prohibitory or penal provision of either of these laws, the contract in that respect must fall.

“The settled law of the land at the time a contract is made becomes a part of it and must be read into it.”

Weinreich Estate Co. v. A. J. Johnston Co.,
21 Cal. App. Dec. 150, 152;

Spencer et al. v. Houghton, 68 Cal. 82, 90;
Stohr v. S. F. Musical Fund Society, 82 Id.
 557, 560;
Deweese v. Smith et al., (C. C. A.) 106 Fed.
 438, 442.

“The rule is that all laws in existence when an agreement is made, necessarily enter into, and form a part of, it, as fully as if they were expressly referred to and incorporated into its terms.”

Armour Packing Co. v. U. S., (C. C. A.)
 153 Fed. 119.

The general rule respecting the illegality of a contract penalized by law, or, we may add, the attempted performance in an illegal manner of an otherwise valid contract, was laid down at an early date by Lord Holt in the case of

Bartlett v. Binor, Carth. 252,

as follows:

“That every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.”

The *Civil Code of California*, Section 1667, provides:

- “That is not lawful which is:
1. Contrary to an express provision of law;
 2. Contrary to the policy of express law, though not expressly prohibited; or
 3. Otherwise contrary to good morals.”

Said Judge Henshaw of the Supreme Court of California in delivering the opinion of that court in the case of

Levinson v. Boas, 150 Cal. 185, 193:

“It is to be noticed that every case from every court recognizes that when a statute has been made for the protection of the public, a contract” (or, we may add, an attempted performance of a contract) “in violation of its provisions is void.”

That a sale prohibited by law is void is further sustained by the following authorities:

Benjamin on Sales, (Bennett's 7th Am. Ed.) 517;

Williston on Sales, Secs. 669, 680;

Page on Contracts, Secs. 329 et seq.;

Miller v. Ammon, 145 U. S. 421; 36 L. Ed. 759;

Church v. Knowles, (Me.) 63 Atl. 1042;

Florence Cotton Oil Co. v. Anglin, (Ark.) 152 S. W. 295; 43 L. R. A. (N. S.) 1109 and note;

Church et al. v. Proctor, (C. C. A.) *post*;

McConnell v. Kitchens, (S. C.) 47 Am. Rep. 845;

Berka v. Woodward, 125 Cal. 119, 127;

Savings Bank of San Diego County v. Burns, 104 Cal. 473.

The rule is well illustrated by the so-called “fertilizer cases” some of which have been just cited. A number of southern states have statutes prohibiting the sale of fertilizer without an inspection

and mark by the state officials, and these cases hold that an action for the purchase price of such uninspected or unmarked fertilizer can not be maintained and that a note given for such purchase price is void. It can not be said that the executory contract of sale itself is illegal in these cases for in none of them is it said that the parties contracted for the sale of uninspected fertilizer; on the contrary, the executory contract for the sale of fertilizer was legal and valid but when the vendor in performance of such valid executory contract furnished uninspected and unmarked fertilizer, such performance was illegal and could not be made the basis of an action.

McConnell v. Kitchens, supra;

Allen v. Pearce, (Ga.) 10 S. E. 1015;

Van Meter v. Spurrier, (Ky.) 21 S. W. 337;

Baker v. Burton, 31 Fed. 401;

Florence Cotton Oil Co. v. Anglin, supra.

Our Supreme Court in the case of

Berka v. Woodward, supra,

said:

“The courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals * * *. The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it.”

It is patent that if a contract of that character is void, an act denounced by such a statute is equally

void, though performed ostensibly in pursuance of a valid contract.

In the case of

Savings Bank of San Diego County v. Burns,
supra,

the court held (quoting from the syllabus):

“The general rule is that a contract founded upon an illegal consideration or prohibited by statute is void; but there are exceptions to this rule, where the parties are not in *pari delicto*, and where a class of contracts is prohibited by statute for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegality of such contracts.”

Now when the contract in question, which calls for an article of human consumption, was entered into in this state, there were these two Pure Food Acts in existence, virtually identical as far as we are concerned, and which, we may here parenthetically remark, may coexist and be equally effective,

Crossman v. Lurman, 192 U. S. 189, 49 L. Ed. 401, affirming the New York Court of Appeals decision, s. c. 83 N. E. 1077,

whereby the introduction into and sale in this state of articles of food adulterated within the meaning of each of these acts, that is, in the filthy condition in which the salmon was proved to be, are prohibited and made a criminal offense; and food so adulterated is subject to condemnation and destruction.

Said the Circuit Court of Appeals for the First Circuit, in the case of

Church et al. v. Proctor, 66 Fed. 240, 243
et seq.,

where the conditions were reversed and the plaintiff in the court below (Proctor), in seeking the enforcement of a contract for the purchase and delivery of fish, was charged with the violation of a state statute:

“As bearing upon the general question whether Proctor’s purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor’s manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. * * *

It is manifest that this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be successfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not conform to the statute, but that the packages were falsely marked. The maxim, ‘*Ex dolo malo non oritur actio*,’ fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish, within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the

purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from nondelivery of the subject-matter intended to be used in violation of the statute law" (citing a number of authorities).

"Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defense. This is not an answer. The defense of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practicing imposition. It would be a strange rule of law which would extend relief to a *particeps criminis*, and withhold relief from an innocent party, who seeks to avail himself of its protection when the imposition is discovered" (citing authorities). * * *

“Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not.”

It follows that as defendant was forbidden to supply in fulfillment of the contract and to sell this spoiled salmon, which was subject to official condemnation and destruction, the sale thus prohibited by laws which were passed for the protection of the public was void, and, therefore, defendant received the money paid to it by plaintiff without any consideration therefor.

The jury found, as it could not otherwise have done, in favor of the plaintiff, and thereby established that under the issues framed by the pleadings there had been a failure of consideration on defendant's part for the purchase price of the salmon, and it also found under the court's instructions (Trans. pp. 169-171, 174) that defendant had breached the contract made with plaintiff by delivering to the latter salmon which was unfit for human consumption; for the court charged the jury that it was defendant's duty to deliver salmon that was fit for

human consumption “since the pure food law of the United States forbids the sale for that purpose of decomposed or adulterated food” (Trans. pp. 168, 169). We may be sure that the nominal amount of the verdict was due to the instruction, technically accurate in the abstract but not here applicable, that

“If it [plaintiff] has satisfied you that there has been a breach of this contract, it must furnish you a reasonable basis upon which you can, without speculation, without going out into the realms of conjecture, find with reasonable certainty the damage that it has suffered; but if the plaintiff fails to furnish a [the] jury with that degree of evidence, then, although it may appear that it is entitled to recover, the jury are at liberty to render a verdict for nominal damages, as I suggested the other day, of one dollar or any other insignificant sum” (Trans. p. 174).

We contend that the jury was furnished with such “reasonable basis” and that inasmuch as the evidence conclusively shows that a large part of the salmon in question was spoiled prior to the time when it was delivered to plaintiff so as to make it commercially worthless, the only verdict which could have been rendered by the jury was one in favor of the plaintiff for at least the full amount of the purchase price paid by it; for defendant could not legally sell to plaintiff any food that was unfit for human consumption.

Said the Supreme Court of Pennsylvania, in the case of

Catani v. Swift & Co., 95 Atl. 931,

quoting with approval from the cases of

Ketterer v. Armour & Co., 200 Fed. 322, and
Elkins, Bly & Co. v. McKeon, 79 Pa. St.
 493, 502,

“Where a state statute provides that there shall be an implied contract that food sold shall be fit for household consumption, recovery may be had from the packer without proving that he knew the food was unwholesome and the packer is liable to the ultimate consumer of the diseased food.”

See further

U. S. v. Sprague, *post*;

U. S. v. 13 Cases of Frozen Eggs, (C. C. A.)
 215 Fed. 584.

Plaintiff itself would have been liable for damages to any injured person if it had allowed this spoiled salmon to be sold for consumption after learning of its true condition.

Ward v. Morehead City Sea Food Co.,
 (N. C.) 87 S. E. 958.

As we have before said, the contract itself was perfectly lawful. It was the performance thereunder that was unlawful. Nothing in the contract contemplated a violation of any law, particularly the laws relating to pure food.

The verdict of the jury, in so far as it only awards a nominal amount of damages to plaintiff is also against the evidence and the court's instruction relating to the removal of swells and rusty tins

from the shipment. The court instructed the jury, in part (Trans. pp. 167, 168):

“The contract, so far as it relates to the goods in controversy, provides that the shipment was to be overhauled by defendant, the seller, at San Francisco, and all swells and rusty tins were to be taken therefrom, after which ‘no reclamation of any nature will be allowed’; and that plaintiff was to have the privilege of inspecting the salmon before taking delivery; and it further guarantees that the salmon shall ‘be equal to the 1911 pack,’ as expressed.

The provision that after the removal of the swells and rusty tins ‘no reclamation of any nature will be allowed’ must be understood, in view of the nature of the goods involved and the other provisions of the contract referred to, as meaning that after such removal no reclamation could be had for defects of the character specified, that is, such defects as may usually be ascertained by external inspection at the time of the tins or containers. In other words, while no recovery may be had by the plaintiff for loss suffered through swells or rusty tins developing after such inspection and removal, the provision does not mean that reclamation may not be had for defects, if they existed at the date of delivery, that could not be so discovered or detected, which either rendered the goods unfit for the purpose for which it was dealt in by the parties, or made it of a quality below that of the pack of 1911; otherwise, the provision guaranteeing the fish to be equal to the pack of 1911 would have no effect.”

It must be admitted that this instruction is not altogether a clear interpretation of the contract especially in view of the legal prohibition against

the importation and sale of inedible food. Assuming, however, that it is free from objection, it laid down a method for determining a basis for the recovery which the jury apparently failed to apply to the established facts of the case; for, as we have heretofore shown, it was alleged in the answer that on the arrival of the salmon in San Francisco defendant overhauled it and removed therefrom all swells and rusty tins (Trans. p. 30), and one of its foremen testified (Trans. p. 158) that in the fall of 1912, he overhauled this salmon at Mission Rock Warehouse and separated from the bulk of it the rusty tins and swells and light cans. It was further shown that thereafter and just before delivery 190 cases of damaged salmon, each case containing 48 tins, were thrown or dumped overboard from the warehouse (Trans. pp. 150, 151). Hence, according to the allegations of the answer and uncontradicted testimony offered by defendant, all of the swells then existing had been removed from the goods in question; and yet the testimony uncontradictedly shows that at that very time, to wit, the date of its delivery a large part of the salmon still remained unfit for human consumption in a greater or less state of decomposition, which was undiscoverable by external inspection, and which rendered the merchandise as a whole worthless and far inferior in quality to the pack of 1911. Hence, under the court's instruction the jury was left no alternative but to find that at the time the salmon was delivered by defendant none of the damage was discoverable by

external inspection and that plaintiff was entitled to recover the full purchase price thereof.

Even if this instruction to the jury could be so construed as to mean that there could be no recovery by plaintiff for swells developing after the salmon had been delivered, but whose presence at such time was not discoverable by external inspection, nevertheless the nominal amount of the jury's verdict was still unjustified, for it was shown on behalf of the plaintiff uncontradictedly that not long after the salmon had been delivered, 30, 39, 60 per cent (according to various witnesses who made the examination), of 2100 cases of salmon stored in the Mission Rock Warehouse in San Francisco was unfit for consumption, judging merely from organoleptic tests, which percentage would have been increased very considerably had a bacteriological examination been made of the salmon, eliminating from consideration all swells and rusty tins, except one which found its way into the shipment to the U. S. Laboratory at Seattle (Trans. pp. 51, 52, 70, 73, 81, 82, 85-88, 132, 133). 2100 cases of salmon so honeycombed with rottenness as to be practically worthless, not a can of which could have been sold without endangering human life, figured at 85¢ a dozen cans, i. e., \$3.40 a case, the purchase price, amounts to the sum of \$7140; or at \$1 a dozen cans, i. e., \$4 a case, the market price of the salmon at that time, had it conformed to the 1911 pack (Trans. p. 56), these 2100 cases of warehouse salmon would have been worth \$8400. Here,

then, were definite figures furnishing a "reasonable basis" upon which the jury could and should have based a verdict for a substantial amount, even if plaintiff, under its contract, was obliged to stand the loss of the abnormal quantity of rotten salmon which could not be detected by external examination at the time the goods were delivered to it in San Francisco, and which thereafter developed into swells.

Again, the verdict of the jury ~~was~~ plainly against the evidence and the court's further instructions to the jury, reading as follows:

"There is no controversy over the fact that the purpose for which the salmon was sold was for human consumption. It was, therefore, the duty of the defendant, under the terms of the contract, and the law as well, to deliver to plaintiff salmon which was, at the time of its delivery, substantially capable, taking and regarding the shipment as a whole, of being used for such purpose, since the Pure Food Law of the United States forbids the sale for that purpose of decomposed and adulterated food. Therefore, should you find that the salmon was not at the time of its delivery, substantially of a character, that is, over and above the percentage of defective cans usually found in goods of the character of those involved, in condition, taking the shipment as a whole, of being used for human consumption, and that plaintiff did not know and could not have ascertained at the time it took delivery that such was its condition, except by opening the cans and thereby destroying its marketable quality, plaintiff is not precluded from recovery for such defects, and your verdict should be in its favor for the difference between the market

value which the salmon would have had at the time of its delivery to plaintiff, had it been of the quality called for, and its actual value as delivered" (Trans. pp. 168, 169).

It is further against the evidence and the following instruction of the court:

"And, should you find that the salmon as a whole or an entirety, by reason of its spoiled condition at the time of delivery, had no real value as a merchantable commodity, there would be an entire failure of consideration, and in that event you should return a verdict in favor of plaintiff for the amount paid by it to the defendant for the salmon which it is admitted was \$16,961.30, together with interest on \$9,821.30 thereof from the 18th day of November, 1912, and on \$7,140 thereof from the 26th day of November, 1912, the respective dates of payment, to the present time, at the rate of 7 per cent per annum" (Trans. p. 169).

The verdict, also, is contrary to the evidence and to the following instruction of the court:

"But if you find that the salmon was not, at the time of its delivery, substantially equal in quality and condition with that of 1911, defendant has not fulfilled its guarantee, and plaintiff will be entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with, over its actual market value at that time in the condition in which it was delivered" (Trans. p. 170).

And also:

"Should you find that the salmon was, either as a whole or to any substantial extent over and above the usual percentage of spoiled or defective cans, unfit for human consumption

at the time of its delivery, ignorance of such fact by defendant would not excuse it from fulfilling its contract to deliver salmon of the character stipulated" (Trans. p. 170).

This brings us to a consideration of the contract, and the correctness of the construction put upon it by the trial court is challenged by our further specification of error that

II.

THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY UNEQUIVOCALLY, IN EFFECT, AS REQUESTED BY PLAINTIFF IN ERROR, THAT IT WAS ENTITLED TO RECOVER THE PURCHASE PRICE OF WHATEVER INEDIBLE SALMON DEFENDANT HAD DELIVERED TO IT REGARDLESS OF THE EXISTENCE OF SWELLS (Assignments VII, XI, XV, XVII and XVIII).

The trial court allowed an exception to each instruction which the court declined to give in the form and as requested by plaintiff (Trans. p. 176), apparently satisfied that its attention had been sufficiently called thereto without the necessity of further particularity; and for brevity of discussion we group under one head these requested instructions on different phases of one subject. They are as follows:

"VII.

It is admitted here by the pleadings that the salmon in question was packed in the Territory of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here

concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this state from any other state or territory, and the sale in this state of any article of food which is adulterated within the meaning of the act is prohibited; and that any person who shall so import or receive any such article so adulterated, or who having so received in this state shall deliver for pay, or otherwise, any such article so adulterated shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act. Nor is it necessary that the adulteration be added by the hand of man. It is sufficient, in the eye of the law if it be added by nature.

VIII.

It is a rule of law 'that all laws in existence when an agreement is made necessarily enter into, and form a part of it, as fully as if they were expressly referred to and incorporated into its terms.' Hence the Pure Food and Drugs Act, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express

provision against the delivery of salmon which is adulterated within the meaning of that act.

IX.

If you shall find that the salmon in question when the cans were opened, was so badly, or otherwise, decomposed, as to be unfit for human consumption you are entitled to believe and find that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore prohibited.

X.

The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, that its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to \$16,961.30, with interest on \$9821.30 thereof from the 18th day of November, 1912, and on \$7140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

XI.

If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant, and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in ignorance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which

it is agreed amounted to \$16,961.30, with interest on \$9821.30 thereof from the 18th day of November, 1912, and on \$7140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

XV.

The contract made between the parties to the suit provided, among other things, that the 'Archer' brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this state, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those acts, even if plaintiff did not inspect the salmon before taking delivery.

XVII.

I further charge you that by the contract in suit defendant warranted that the 'Archer' brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of the 'Archer' brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

XVIII.

You are not concerned with the determination of the question as to whether or no a do-over salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in controversy was purchased warranted that this salmon, no matter what the general character or reputation of do-over salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.

You are, therefore, only concerned with the determination of the question: Was the Archer brand pack of 1912 delivered to plaintiff by defendant equal in quality to the Archer brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the fall of 1912 suitable for human consumption?"

We have already shown that the contract in question must be construed in the light of the law bearing upon the same subject-matter, and that in view of the penal and prohibitory character of these laws any provision of the contract inconsistent therewith must fall. Eliminating, however, for the present any reference to the Pure Food Acts, it is apparent that this contract, inartificially drawn, is not entirely free from ambiguity in several respects. It provides against any reclamation for swells and rusty tins—(rusty tins are only objectionable as indicating the later probability of holes which produce swells by admission of air to the inside of the cans and may be the result

of improper lacquering)—followed later by a guarantee that the salmon shall equal the 1911 pack, in character and quality of course. In other words, if the 1912 pack was equal to the 1911 pack, the purchaser was not entitled to any reclamation for swells and rusty tins; and these must then be discoverable by external inspection, as otherwise the privilege of inspection before delivery given to plaintiff would be idle.

The circumstances under which the contract was made should be taken into consideration in reaching the intention of the parties to it.

Stanley v. Green et al., 12 Cal. 148;

and a contract will be so construed, if possible, as will

“not impute to the parties an intention to violate the law. Presumptions of the law are in favor of the good faith of all parties to a business transaction, and, if the language of a contract is fairly susceptible of a construction or explanation which renders it valid and enforceable, according to its terms, such construction will be adopted *in preference to one which brands it with illegality, and makes it possible for one to repudiate the performance of his promise, while demanding full payment of the consideration to be given therefor*” (italics ours).

6 *Ruling Case Law*, “Contracts”, Sec. 229.

Or, as the Supreme Court of Colorado observed:

“Where an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—

that one should be favored which upholds the right.”

Wyatt v. Larimer and Weld Irrig. Co.,
36 A. S. R. 280, 288.

But counsel for defendant in error will undoubtedly contend that the contract is not susceptible to two constructions; that it means, in effect, that defendant can deliver thereunder merchandise prohibited by law, if plaintiff does not discover the imposition before delivery—not that the contract specifically says so, but because of the general language employed. The Supreme Court of Georgia, however, said that it was not to be presumed that people intend to violate the law, and that the language of their undertaking must, if possible, be so construed as to make the obligation one which the law would recognize as valid.

Equitable Loan & Security Co. et al. v. Waring, 62 L. R. A. 93;

See further,

Hubbard v. Miller, (Mich.) 15 Am. Rep.
153, 160.

A court will act

“upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as ‘the purchaser cannot be suffered to buy goods to lay them on a dunghill * * *’ it will not be assumed that the seller desires to obtain money for a worthless article”.

Hall Furniture Co. v. Crane Breed Mfg. Co. et al., (N. C.) 57 L. R. A. (N. S.)
428, 429.

The parties, then, in view of their prior course of dealings with each other, apparently assumed that the amount of such swells would correspond, generally, with those found in shipments of earlier years,—the 1911 pack contained only one-half of one per cent of spoiled salmon, and Hume, the well known canner, said “one per cent would be excessive” (Trans. p. 80),—and therefore agreed that there would be no reclamation for any such negligible amount of defective salmon; but that in order to prevent even this loss the buyer was privileged to see that the swells were removed before taking delivery; and as the inspection was, by reason of the character of the goods, naturally an external one only, it was only cans which then gave external evidence of their inedibility that came within the inhibition of the contract against subsequent reclamation.

The warranty that the salmon would equal the 1911 pack is an integral part of the contract and any other clauses therein, particularly those preceding it, must be read in connection with it. It would be quite ridiculous for the parties to provide that the salmon would equal the 1911 pack, an admittedly edible salmon, and then provide that the seller could deliver rotten salmon with no redress on the part of the buyer.

Apparently what was in the court's mind in instructing the jury (Trans. p. 168) was that swells existing at the date of delivery, and therefore discoverable by external inspection, and which were

not removed by the seller, were not a subject for reclamation, no matter what might be their quantity, nor was the purchaser entitled to reclamation for swells so discoverable which developed after delivery, but that the buyer was entitled to reclamation for all swells that developed after it took delivery of the goods if they existed at the date of delivery but could not be discovered by external inspection. Now the court's instruction ignores the testimony of several impartial witnesses to a fact which was not controverted (Trans. pp. 71, 72, 87, 88, 91, 134) and the testimony of one of defendant's witnesses (Trans. pp. 153, 155) that *swells developing either before or after delivery commenced at the cannery shortly after the re-processing of the salmon*, by reason of the decomposition of the fish, and developed either slowly or rapidly, depending upon the condition of the can, the extent of vacuum in it, or the completeness of the sterilization of the tins, and may have developed to such an extent as to be noticeable to the eye when the salmon reached San Francisco or they may have developed so slowly as to escape the ordinary observation at that time; but whether the salmon was decomposing rapidly or slowly, *the bacteriological action had set in almost immediately after the re-processing* and it had then become adulterated and inedible within the meaning of the Pure Food Acts above referred to, for at that time the chemical action had started that made the salmon, even before it was placed in the hands of the consumer, unfit for use as food.

Said the Circuit Court of Appeals in the case of

U. S. v. 443 Cans of Frozen Egg Product,
193 Fed. 589, 594,

which was subsequently reversed only on the question of the jurisdiction of the appellate court:

Where a "frozen product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and demand the closest judicial scrutiny, before it is allowed to become an article of food consumption * * *. The condition of a product in the hands of a consumer is the place and time to test its fitness for food."

In that case ten per cent of sugar was added to the egg product so as to prevent the deterioration of the egg when frozen; but when the frozen product was melted the sugar tended to hasten the decomposition. The court held that although decomposition had not really set in until the product was being melted for use as food, nevertheless it was adulterated within the meaning of the Federal Act and contraband when prepared, before its use as food.

Said the court in the case of

U. S. v. Sprague et al., 208 Fed. 419:

"A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly 'filthy' under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses."

It was there held that the term “adulterated” as used in the Act is not restricted to an addition by the hand of man, but includes any substance which has been added by nature and is contained in the article to be shipped.

In the case of

U. S. v. 200 Cases of Adulterated Tomato Catsup, 211 Fed. 790,

Judge Bean of Portland, in reviewing and following the evidence of various witnesses including that of Dr. Schneider of the University of California, one of plaintiff’s witnesses here, held that the presence of bacteria so as to make an article unfit for food brings it within the letter and spirit of the law, and that, to bring it within the inhibition of the statute, it is not necessary to show that the product in question would be injurious to health. Decomposition may be either “in part or in whole”.

The requested instruction accurately stated the proper construction and effect to be given to the contract.

III.

WE FURTHER SPECIFY AS ERROR THE ACTION OF THE TRIAL COURT IN REFUSING TO CHARGE THE JURY, IN SUBSTANCE, THAT THE SELLER WAS BOUND TO FURNISH AN ARTICLE THAT WAS CAPABLE OF BEING USED, EVEN THOUGH IT EXPRESSLY REFUSES TO WARRANT ITS CONDITION AND GIVES THE PURCHASER AN OPPORTUNITY OF INSPECTING IT (Assignment XIV).

This proposed instruction reads as follows:

“You are further instructed that when anyone sells an article of any kind, ‘Although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it.’

This is especially true in view of the state and federal Pure Food Acts. This rule rests ‘upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud,’ and, as ‘the purchaser cannot be supposed to buy goods to lay them on a dung hill, * * * it will not be assumed that the seller desires to obtain money for a worthless article. * * *’ So, that, upon this issue, after considering all the evidence, if you find therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for his salmon, with interest to the present time.”

This is particularly true in the case at bar. External inspection would yield but little, if any, information. Each can must be opened to determine the condition of its contents and when opened under such circumstances it ceases to be of use. Not only is a warranty of the edibility of the salmon implied in the Federal and State Acts, *supra*, but it has been held that even if one refuses to warrant the condition of any article sold and

advises the purchaser to see it, nevertheless the seller is bound to furnish an article which is capable, not necessarily of coming up to the purchaser's expectation, but at least of being put to *some* use; for as stated by Lord Ellenborough in the case of

Gardner v. Gray, 4 Campbell 144, 16 Rev. Rep. 764.

“The purchaser cannot be supposed to buy goods to lay them on a dung hill.”

This is particularly true of food sold in hermetically sealed containers.

In the case of

Hall Furniture Co. v. Crane Breed Mfg. Co. et al., supra,

the court held that a person who sold a second-hand article that was not fit for any use as such (quoting from the syllabus),

“cannot retain the purchase price, although he expressly refuses to warrant its condition, and advised the purchaser to see it, since he was bound to furnish an article capable of being used”.

Hence if the article in question was unfit for food, which was the only way it could have been used, and was the object for which it was purchased, and if it can only be consigned to a “dung hill”, the implied warranty in the contract is broken and recovery can be had for the purchase price, regardless of the guaranty contained in the contract.

that the fish would be equal to the fish of a previous pack, i. e., that it would be edible and merchantable.

IV.

WE FURTHER SPECIFY AS ERROR THE ACTION OF THE TRIAL COURT IN REFUSING TO ADMIT IN EVIDENCE THE ORIGINAL JUDGMENT ROLL IN THE CASE OF UNITED STATES OF AMERICA V. TWENTY-ONE HUNDRED CASES OF CANNED SALMON, AND THE CERTIFIED COPIES, RESPECTIVELY, OF THE JUDGMENT ROLLS IN THE CASES OF UNITED STATES OF AMERICA V. THREE HUNDRED CASES OF SALMON; UNITED STATES V. TWENTY-FOUR CASES MORE OR LESS CONTAINING FOUR DOZEN CANS EACH; UNITED STATES OF AMERICA V. SEVENTY-FIVE CASES MORE OR LESS OF CANNED SALMON; AND UNITED STATES OF AMERICA V. TWENTY-EIGHT CASES MORE OR LESS OF ARCHER BRAND SALMON (Assignments II-VI).

In the suit first mentioned the court decreed condemnation of the salmon in Mission Rock Warehouse for the reason that when shipped from Alaska to San Francisco it was adulterated under the provision of section 7, paragraph 6 of the Pure Food and Drug Act of Congress, approved June 30, 1906, in that the contents of these cases of salmon consisted in whole or in part of a filthy, decomposed, putrid animal or vegetable substance (Trans. pp. 112, 99), and the salmon was destroyed by the United States Marshal. In the other cases above mentioned different portions of the salmon sent to various eastern places were condemned at different times because putrid and decomposed when imported into these different states.

The court rejected this documentary evidence apparently on the ground that the defendant was not specifically made a party to each of these proceedings. The monition, however, that was published in each case was a notice to the world of the pendency of these suits. No question was raised regarding the jurisdiction of the court in each case which was amply shown by each record, either by recital in the judgments which were *prima facie* evidence of the truth thereof,

Simmons v. Threshour, 118 Cal. 100;

Koons v. Bryson, (C. C. A.) 69 Fed. 297,
or otherwise by the records themselves; and the decree entered in each case was binding upon the defendant and established the status of various portions of the food stuff in controversy as a contraband and otherwise worthless article of merchandise.

Kriess v. Faron, 118 Cal. 142;

Makins Produce Co. v. Callison, (Wash.)
121 Pac. 837;

Street v. Augusta etc. Co., (S. C.) 75 Am.
Dec. 714, and note;

23 Cyc., 1410, and note 63.

In the first case the testimony in the present record shows that the court decreed the condemnation of the salmon upon evidence which excluded the swells, while in the other cases condemnation was ordered regardless of the particular character of the defective salmon.

The importance and materiality of the evidence and the prejudicial character of the court's error in refusing to allow these records to go in evidence hardly require comment.

V.

WE FURTHER SPECIFY AS ERROR THAT THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS REQUESTED BY PLAINTIFF IN ERROR ON THE THEORY OF ESTOPPEL (Assignment XVI).

As before stated, the fourth count of the amended complaint sets forth an estoppel of defendant to assert plaintiff's failure to inspect the salmon, and is only pertinent in the event that by such failure plaintiff would otherwise be properly chargeable with the loss arising from all of the swells that were not removed from the salmon before delivery. By reason of the testimony given on defendant's behalf to the effect that all of the swells had been removed from the bulk of the salmon before its delivery, and the court's charge, as we construe it, that defendant was responsible for all after developed swells not then discernible by external inspection, the estoppel feature loses much of its significance, unless it be contended by defendant that the court's charge in this respect and the contract have been misconstrued, and that plaintiff's failure to inspect the salmon before delivery entailed upon it the loss arising from any swells existing

in the salmon at any time thereafter. Of course, inspection would not disclose the presence of swells not then discernible externally.

It will then be noted that the amended complaint alleges and the record shows, that the furnishing by the packer to the purchaser of samples of canned fish, especially do-overs, before delivery, had been customary in the trade, and particularly in the dealings between the parties hereto, for a number of years prior to 1912, and this usage formed part of the contract.

Union Ins. Co. v. American Fire Ins. Co.,
107 Cal. 327, 333;

but plaintiff was induced to accept and pay for the salmon without inspection by reason of the character of the samples and the representations of defendant's manager respecting the quality of the salmon, and plaintiff acted in sole reliance thereon (Trans. pp. 44, 47, 48, 49, 63, 64, 65, 66, 81, 83, 115, 117). This constituted a complete estoppel and was correctly set forth in plaintiff's proposed instruction No. 8 (Trans. pp. 165, 166) reading:

"I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than 'do-over' salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representations so made by defendant concerning it, or with the samples

furnished by defendant to plaintiff, but was unmerchandise, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that inspection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery can be had by plaintiff, since defendant by its conduct, in such event is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff."

The court charged the jury on this subject as follows (Trans. p. 171):

"Should you find that the salmon, as a whole, was at the time of its delivery substantially of the character called for by the contract, as I have construed it for you, but that some of the swells and rusty tins were inadvertently or unintentionally overlooked by defendant in making its examination, that plaintiff did not exercise its privilege of inspecting such shipment before taking delivery, nor make a claim for reclamation on account of such omission within the time provided by the contract, and was not prevented therefrom by any false statement or act wilfully made or done by defendant with intent to prevent plaintiff from making such claim, then plaintiff cannot recover by reason of any damage flowing from such omission."

This instruction was erroneous for several reasons.

In the first place, this instruction virtually made bad faith an element of the estoppel. This is not required. An estoppel may arise even where there is not only no fraudulent representation but, on the contrary, where the representation upon which

the estoppel is based may have been made in perfect good faith.

Seymour v. Oelrichs et al., 156 Cal. 782, 790 et seq.

Estoppel may be based upon mere negligence without fraud of the party sought to be estopped.

Leather Manufacturers Nat'l Bank v. Morgan, 117 U. S. 96, 29 Law Ed. 811.

Said the court in the case of

Allen v. Hance, 161 Cal. 189, 196:

“Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or *in pais*, in its essence it amounts to this, that a man is forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so.”

10 Ruling Case Law, pp. 689, 691.

The court's instruction was further violated in this respect by assuming at the outset

“That the salmon, as a whole, was, at the time of its delivery, substantially of the character called for by the contract,”

which begs the entire question for it presupposes what the jury is expressly called upon to decide.

The instruction also offends against the prohibitory provisions of the Pure Food Acts, above referred to, which, as we have seen, makes invalid any provision in a contract conflicting therewith, or any act in the performance of an otherwise valid contract, made penal by their terms; and the

instruction does violence to the contract itself regardless of these statutes in making the inadvertence or lack of intention of defendant an element of the case.

U. S. v. Sprague et al., supra;

U. S. v. 13 Crates of Frozen Eggs, supra.

The instruction is further erroneous because it is contrary to the pleadings and the evidence in the case offered by defendant, to the effect that it removed all swells before delivering the salmon.

Finally, the instruction is contrary to earlier instructions given by the court to the jury respecting the liability of defendant under the contract in question.

Nevertheless the verdict of the jury in plaintiff's favor may reasonably be construed as determining that the salmon did not comply with the contract and that defendant failed in its duty of removing the swells and that plaintiff was wrongfully prevented by defendant from making inspection of the salmon, thus establishing the estoppel contended for.

To summarize, throughout this controversy our contention has been and is now as follows:

(1) The contract for the sale and purchase of the "Archer" brand salmon was a valid contract capable of being lawfully performed.

(2) The salmon was adulterated and inedible at the time it came into the State of California within the meaning of the United States Pure Food

and Drug Act, and the State Act of similar import, and hence its importation and sale here was illegal and forbidden.

(3) The delivery of salmon of such a contra-band character furnished no consideration to plaintiff for the purchase price paid by it therefor.

(4) The failure of defendant to deliver edible salmon under the contract constituted a breach thereof.

(5) Since plaintiff paid the purchase price for the salmon in ignorance of its true condition, it is entitled to either the return of its money because of the complete failure of consideration on defendant's part, or, substantial damages for the breach of the contract.

(6) Defendant is by its conduct estopped from basing any defence to the suit upon plaintiff's failure to inspect the salmon before taking delivery thereof, if this defence were otherwise of any avail.

We, therefore, respectfully submit that by reason of the errors of the trial court and the character of the verdict of the jury the judgment entered thereon should be reversed and a new trial awarded.

Dated, San Francisco,

October 2, 1917.

SAMUEL KNIGHT,

F. E. BOLAND,

Attorneys for Plaintiff in Error.

No. 2974

IN THE

United States Circuit Court of Appeals ³

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC COAST)
(a corporation),

Plaintiff in Error,

VS.

NORTH ALASKA SALMON COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

OTTO IRVING WISE,

Attorney for Defendant in Error.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

FILED
OCT 15 1917

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BRIEF FOR DEFENDANT IN ERROR.

In this brief we shall present for consideration by the court:

1. A statement of the evidence, avoiding as far as possible a repetition of the facts stated by plaintiff in its memorandum.

2. An analysis of plaintiff's second amended complaint upon which the cause was tried, from which we expect to show that under no circumstances would plaintiff have been entitled to a verdict. As the jury awarded plaintiff nominal damages, no error can be predicated thereon.

3. A discussion of the errors assigned to the ruling of the trial court in refusing to admit the

judgment rolls in various actions in which portions of the salmon sold to plaintiff by defendant was condemned and destroyed.

4. A review of the instructions given and excluded by the trial court both upon the merits and upon the proposition that no proper exception was taken thereto and that the same cannot be reviewed in this proceeding.

In this manner we expect to fully answer all of the arguments advanced by plaintiff and show to the satisfaction of the court that the judgment should be affirmed.

1. STATEMENT OF EVIDENCE.

Defendant was engaged in the business of canning Alaska salmon. Plaintiff was engaged in the brokerage business, and for several years prior to the time of the present controversy purchased the greater part of defendant's output of "do-over" grade salmon. Defendant's canneries were situated at Bristol Bay, in northern Alaska. The run of salmon in this district commences about the middle of July and continues for about two or three weeks. The fish when caught are piled upon a dock; they are then cleaned and cut into pieces the size of the salmon can; the cans are filled automatically and the tops soldered on. The fish is then placed in retorts and cooked for about an half hour at a temperature of 212 degrees Fahrenheit. This cooking causes the air in the cans to expand and the ends are

puffed when the fish is taken from the retort. If the can has a leak, the ends are normal and these cans are immediately removed from the pack; those cans which are found to be in good condition are struck by a small mallet with a pinpoint in the end, which causes the ends to collapse and they are immediately resoldered, thus causing a partial vacuum. The perfect cans are then returned to the retort and cooked again for about an hour at a temperature of 240 degrees. This completes the cooking process. The cans are then tested for leaks by tapping with a small sounding iron and are also immersed in hot water, and air bubbles will appear upon any can which has developed a leak. All defective cans are removed at once from the balance of the pack, as in the first cooking, and are then reprocessed; that is, the leaks are mended with solder and the fish then undergoes the same treatment as has just been outlined.

These reprocessed tins are known as "do-overs". At this point we beg to direct the court's attention to the fact that do-over salmon contains the identical quality of fish as prime or first grade salmon. The only difference between the two is that the do-over salmon has been allowed to stand exposed to the air for some time after the leak was discovered and before the reprocessing is commenced.

Experts called by plaintiff testified that if the defective cans were mended within a day after the discovery of the leak, the fish would not deteriorate and the finished product would be equal as an article

of food to standard salmon. But the practical business men, who testified emphasized the fact that "do-over" salmon was a doubtful commodity and a person who bought it expected to find a certain percentage spoiled. W. A. Frost, plaintiff's agent, testified (Trans. p. 117):

"In handling do-over salmon the amount of bad tins varies considerably. A man who buys do-over salmon expects to find a certain percentage bad."

This fact, known generally to the trade, is the explanation offered for the disparity of price between standard and do-over salmon. The latter are sold for about one-half the price which is paid for the former.

The testimony of Henry F. Fortman, president of the Alaska Packers' Association, the largest producers of canned salmon on the Pacific Coast, illustrates why the canners will not warrant the quality of do-overs.

"Anyone buying do-overs knows that they take chances on goods of this kind. *If the do-overs were all mended, if such a thing were possible, they would be equal to any first-class salmon.* * * *

"In the do-overs you possibly find $\frac{1}{2}$ of the cans in reasonably good condition, another $\frac{1}{4}$ fit for consumption, but they would be partially dry or something of that sort, and $\frac{1}{4}$ *would probably be unfit for use.*

"I do not know the percentage of do-overs put up by the Alaska Packers' Association that was absolutely unfit to eat, because we generally sold our do-overs without reclamation * * *

If you sell do-overs with a guarantee you might as well sell them for prime salmon because if they can return all the poor ones and keep all the good ones, there is no reason for reducing the price on do-overs. * * *

“As a rule do-overs were sold after examination; the purchaser had a right to examine them and pass his own judgment. We sold through J. K. Armsby & Company; they have made no reclamation on do-overs because we sold as is.” (Trans. pp. 151-157.)

Oscar Hoffman and Joseph Durney, both dealers in canned foods, including salmon, corroborated this testimony in every detail.

The significance of this testimony will become more apparent when we subsequently come to discuss the question of failure of consideration.

Shipments of the season's pack from northern Alaska reach San Francisco during the months of September and October; the market price for the pack of that year is thereupon fixed.

There is no established market price for do-over salmon. It had been the custom of plaintiff and defendant for several years to contract for the purchase of the following year's output of do-over salmon immediately after the price of prime salmon was fixed for the current season. The price agreed upon was approximately half that quoted for prime salmon. Pursuant to this custom on November 16, 1911, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed to purchase from defendant five thousand cases of do-over

grade of red Alaska salmon labeled "ARCHER" being the output of the following season's pack. This contract which was in writing contains the following provisions which are essential to a proper understanding of this controversy:

"Archer Brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation *of any nature* will be allowed.
* * *

"Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack."

Upon arrival in San Francisco, the salmon was overhauled and notice given to plaintiff that it was ready for delivery. Samples of the pack were requested, and the testimony shows that the samples were shipped to prospective customers in the East and the Orient. Plaintiff was able to dispose of approximately one-half of the shipment, representing to the purchasers that the salmon was number one quality. and with a guarantee against swells. (Trans. p. 121.) This was apparently necessary because the output of No. 1 salmon for the year 1912 was far in excess of the normal demand.

Plaintiff admits (Trans. p. 67):

"When there is a large pack of standard, or No. 1, salmon, the market for do-overs drops proportionately to the quantity of No. 1. salmon."

In previous years plaintiff had been able to dispose of all of the do-overs it purchased from defendant before arrival of the pack in San Francisco.

The remaining 2100 cases were stored at San Francisco and could not be sold. Several months later complaints were made by Eastern purchasers to whom plaintiff had warranted the quality of the salmon, that some of the fish was unfit for human consumption. Reclamation by plaintiff was obligatory under the terms of its contracts of resale. How the reclamations were calculated, or for what proportion of the fish sold refund was made, nowhere appears in the record. It does appear affirmatively that some of the fish was retained and used by plaintiff's customers.

2. APPLICATION OF FACTS TO THE PLEADINGS.

The amended complaint upon which the issues in this case were framed contained four counts. A demurrer to the first and third counts was sustained. The question to be determined in these proceedings is whether plaintiff was entitled to a substantial verdict under the second or fourth count of the amended complaint. We shall first consider the second count.

The following are the salient allegations:

The execution of the contract of November 16, 1911, referred to above is alleged, and a copy set forth as a part of the complaint; next it is alleged that the defendant warranted to plaintiff that the goods would be merchantable, edible and fit for human consumption; that relying upon such warranty plaintiff paid the purchase price; that subse-

quently plaintiff learned that the goods so shipped did not comply with the warranty but were adulterated within the meaning of the Pure Food and Drug Act; by reason of these facts plaintiff asks for the return of the purchase price. With reference to this count, plaintiff in his brief states:

“The theory of plaintiff is and was that having entered into with defendant a valid and enforceable contract for the sale and delivery by the latter to it of five thousand cases of Archer Brand salmon, and defendant having delivered an inedible, contraband and utterly worthless article of food, in violation of the pure food laws of the United States, plaintiff received no goods for the purchase price paid by it therefor or was damaged by the breach of contract by defendant.”

This action cannot be one for the recovery of the purchase price upon the ground that no consideration was received therefor. If this were the nature of the action, plaintiff would be required to rescind the contract prior to the commencement of the action, and restore or offer to restore everything of value which it received under the contract. It is not contended that plaintiff ever rescinded the the contract. The obvious result of its failure in this respect is that it did not restore or offer to restore the five thousand cases of salmon received under the contract. While it is true that it is unnecessary for a party rescinding a contract to restore that which is absolutely worthless, the evidence in this case shows that more than half of the merchandise here in controversy was in fact resold

by plaintiff and that plaintiff received the purchase price for such sales.

A carload of this fish was sold to the Merchants National Grocery Company of St. Louis. John E. Dummeyer, cashier of that concern, testified (Trans. p. 125):

“Q. Do you remember how much was paid for that salmon?

A. Yes, I have the invoices here; \$3940.00. The exchange on the bill was \$3.95; freight, \$490, which makes a total of \$4,433.95. * * * We received a credit of about \$1350 from plaintiff.”

From the testimony of its own witness, it is shown that plaintiff received and retained at least \$2590 from the sale of the salmon, no part of which was ever tendered to defendant, though plaintiff contends that it was entitled to the return of the entire purchase price, upon the theory of a total failure of consideration. One who seeks to rescind a contract must place the other party in *status quo*.

Plaintiff seeks to avoid its omission to rescind upon the ground that the sale in controversy was void by reason of the fact that the salmon shipped from Alaska was contraband goods and that its shipment constituted a violation of the pure food laws. The contract was valid in its inception. This is admitted, for if the subject matter of the contract was an agreement to sell a product which violated the provisions of the pure food laws, the parties to such contract would be *in pari delicto* and the trial court would have been compelled to

leave them in the same position in which it found them.

Counsel cites many cases to the effect that an executed contract of sale where the consideration is illegal is void. We do not dispute this proposition, but the contract now before the court is an executory contract of sale, the goods contracted for not being in existence at the time the agreement was made.

If the contract was valid at the time of its execution (which is admitted) any illegal act in its performance, which was not contemplated at the time of the execution of the contract, will not invalidate it, but plaintiff's only remedy for such illegal act is for damages as for the breach of the contract. This was held by the Supreme Court of the United States in the case of *Union Gold Mining Company v. Rocky Mountain National Bank*, 96 Cal. 640.

“When a statute prohibits an act or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it.”

~~The only remaining theory upon which this count can be sustained is that it is an action for damages for breach of warranty of the quality of the salmon. It will be noted that though there is an express warranty that the goods would be equal to the 1911 pack, such warranty is neither pleaded nor relied upon by plaintiff.~~

It is also stated in *Barry v. Capen*, 6 L. R. A., page 808:

“If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out”,

and cases cited.

In *Fox v. Rogers*, 171 Mass. 546, plaintiff sued to recover under a contract with defendant to lay drain pipes. A statute in Massachusetts required cast iron pipes. Defendant set up the illegality of the contract as a defense, alleging that plaintiff put in pipes that were not cast iron. Judge Holmes delivered the opinion of the court.

“There is no policy of the law against plaintiff’s recovery unless the contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way * * * the supposed illegal acts entered neither into the promise nor into the consideration * * * it may be that if the pipes are not of the material required by law, they are liable to be taken up * * * but the only question is the fundamental one whether we can say, as a matter of law, that the contract was illegal and that plaintiff can recover nothing. That, in the opinion of the majority of the court, we cannot say.”

In the same case, the following principle was laid down:

“If it (the contract) can by its terms be performed lawfully, it will be treated as legal, even if it is performed in an illegal manner.”

Plaintiff contends in support of its position, that (Plaintiff’s Brief, p. 36):

“The question which the jury was preliminarily called upon to decide was, in the language of the Supreme Court of this State, ‘Did the plaintiff get what it intended to buy and did buy?’ or ‘Did it get what it bargained for?’ ”

We respectfully submit that the plaintiff did get what it bargained for. Mr. Fortman, whose testimony is quoted above, stated that in do-over salmon the purchaser expects to find about one-fourth unfit for human consumption. Plaintiff’s representative, Mr. Frost, admitted that a certain percentage will be bad, his experience showing that it ran as high as sixty per cent. Mr. Field on behalf of plaintiff made an examination of the 2100 cases which were stored in San Francisco in the spring of 1913. This inspection was made under the personal supervision of a professional overhauler of canned salmon. About twenty-five per cent were found to be bad, which is the exact percentage which Mr. Fortman said one would expect to find in do-over salmon. Other examinations made at Eastern points shortly after shipment, disclosed a smaller percentage of spoiled cans (Trans. pp. 123, 128, 129).

The testimony of employees of defendant who worked in its canneries during the 1912 season, including its superintendent, was to the effect that the pack of 1912 was in every way equal to that of 1911; the same process was used; the same care observed in reprocessing; and even the same men employed. The only difference seems to be that in 1911 plaintiff was able to dispose of the salmon

purchased before arrival, but the market was so well supplied in 1912 that plaintiff in order to sell half of the fish was required to make the same guarantees which accompany sales of standard salmon. The result was that complaints were made and plaintiff required to refund to its customers in accordance with its guarantee. But in reply to the inquiry of plaintiff, we assert that it got exactly what it bargained for, do-over salmon of the 1912 pack, equal to the 1911 pack in all respects.

The trial court instructed the jury that the provision of the contract that after all swells and rusty tins had been removed from the pack "no reclamation of any nature will be allowed", meant that no claim for reclamation for swells or rusty tins would be allowed. This interpretation of the contract was, we submit, erroneous. The contract is in no sense ambiguous; it refers to reclamation of any nature. Had it been the intention of the parties to limit plaintiff's right to make claims for swells and rusty tins, the word "any" would have been omitted and the words "swells and rusty tins" inserted. Nor, is there any testimony which would have justified this interpretation. If defendant is correct in its assumption that the contract was intended to bar any right of recovery for breach of warranty after swells and rusty tins were removed, plaintiff has failed to state a cause of action, for there is neither an allegation nor proof that plaintiff's demand for reclamation was made in time. The record is to the

contrary; plaintiff did not assert its claim until long after delivery.

Because of the low price at which do-overs are sold and the expectancy that a very large percentage will be bad, it was undoubtedly the intention of the parties that the purchaser was to assume all risk in connection with the goods after delivery.

This view was taken by the Court of Appeals of Kentucky in the case of *Pratt v. Morris*, 87 S. W. 783. That was an action for breach of warranty for the sale of toilet articles by sample. The contract was in writing, and contained the following warranty:

“All goods are warranted to be the same in quality, material and in all other respects as samples shown by salesmen and if goods are returned by the consumer for any cause they may be returned as above provided. The purchaser agrees to examine and inspect the goods and each part thereof at once upon their arrival at destination and if said goods fail to comply with said warranty he shall, within five days after the date of arrival at destination give written notice by registered mail to Walter Pratt & Co., Chicago, Ill., otherwise all warranties of said goods is waived.”

Defendant refused to pay for the goods, claiming a breach of warranty of the quality on the ground that the goods did not class with the sample. The last portion of the goods were not delivered until August 14th and defendant gave notice of the defectiveness of the first shipment within three days after that. The court held that that was not in time.

“The contract by its terms applied to the goods and each part thereof and requires the notice to be given within five days from the date of arrival. This was not done and no defense can be maintained upon the warranty.”

It was also contended by defendant that inspection of the goods within five days was impossible, and the court instructed the jury as follows:

“That if they believed from the evidence that the goods delivered by plaintiffs to defendant did not come up to the samples shown by plaintiff’s salesmen at the time the contract was made, and shall further believe from the material of said goods that by an examination it could not be made and defects found out within five days from the date of the delivery that said goods did not come up to said samples and that defendant did within a reasonable time examine said goods and offer to return the same to plaintiffs and has since and now holds them subject to plaintiff’s order, they shall find for the defendant.

“The defendant stated that this instruction was erroneous. Morris, the defendant, was an experienced druggist. He understood the nature of the goods as well as the salesmen and knew whether they could be examined in five days or not. The contract was deliberately made and the court cannot make a contract for the parties. While it would have been inconvenient to have examined the goods in five days and we think it could have been done by diligence, but whether it could or not Morris knew this when he made the contract just as well as he does now. If the defects could not be determined in five days, then he should not have bought the goods under the contract. *The contract must be enforced as the parties made it, there being no fraud or mistake in its execution.*”

But assuming that the court's interpretation of the contract is right, the jury was justified in returning a verdict for nominal damages, as plaintiff failed to furnish a reasonable basis for computing the damage suffered by reason of the breach of warranty.

Section 3313 of the Civil Code of the State of California provides:

“The detriment caused by the breach of warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.”

It does not appear what was the actual value of the salmon delivered. Nor did plaintiff present any evidence to prove what its value would have been at the time to which the warranty referred had the contract been complied with. Had the jury awarded substantial damages to plaintiff, the verdict would not have been supported by the evidence.

Having eliminated the second count, plaintiff's right to a reversal of the judgment depends upon the sufficiency of the fourth count of its complaint. This count alleges in substance, the execution of the written contract and the express warranty therein contained that the salmon to be delivered in the year 1912 would be equal to the 1911 pack; that in October, 1912, defendant submitted to plaintiff samples which plaintiff claimed were

taken from the 1912 pack; that these samples were furnished according to a custom, which had been practiced by the parties for several years; that the samples examined by the plaintiff were fully equal to the 1911 pack of Archer Brand salmon and were edible and suitable for human consumption and that relying upon the representation of defendant with reference thereto, plaintiff accepted delivery of the entire shipment and paid the purchase price therefor. It is then alleged that salmon delivered was not equal to the samples and that defendant is estopped from asserting or maintaining that plaintiff is precluded from asserting any claim for damages for breach of the contract for failure to make such claim within ten days after the removal of swells as provided for in the contract, by reason of the representations made by defendant respecting the samples.

It is important to note in this connection that in this count, plaintiff admits that the contract between it and defendant should be interpreted in the manner contended for by defendant, namely, that all claims for reclamation of *any* nature must be made within a limited time and that failure to assert such claim within that period bars the present action.

The evidence in this case, however, did not warrant a verdict in favor of plaintiff on the theory of an estoppel. In order that a party to an action may be estopped from asserting his rights in the

premises, it is necessary (1) that the party to be estopped made the representations attributed to him with intention to deceive or with such carelessness or negligence as to amount to constructive fraud; (2) that the innocent party relied upon such representations and was injured thereby.

The earliest and probably the best known case in this state involving the question of estoppel is *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, an action involving the title to the famous Mariposa grant in which Hon. Stephen J. Field participated. The rule applicable to cases of estoppel is expressed in the last mentioned case in substantially the language which we have adopted above. Neither of these essential elements to the creation of an estoppel exists in the case at bar. The only evidence as to how the samples were obtained was given by Crescent P. Hale, general superintendent of the defendant. (Trans. p. 147.) He stated:

“I drew the samples for plaintiff; I took only one can from each case—taken indiscriminately; I didn’t attempt to pick out any particular cans for sample purposes; the samples from external appearance and weight were the same as the other tins.”

The records of the warehouse company in which the salmon was received, show that three cases of salmon were delivered to the American Trading Company prior to the time that the bulk of the shipment was sent in accordance with plaintiff’s

directions. These three cases were a part of the 1912 pack. (Trans. p. 150.)

A. B. Field, manager of the canned goods department of the plaintiff, admitted that he had no reason to believe that the samples furnished him were not taken from the 1912 pack and that three cases of samples were received by him prior to the delivery of the shipment. (Trans. p. 48.)

This testimony negatives any suggestion that defendant delivered to plaintiff as samples any goods other than from the lot purchased by the plaintiff in 1912, or that they were not a fair sample of the pack.

From the testimony of the same witness, it appears that the samples were not furnished as a substitute for inspection by the plaintiff, but to send to prospective customers. The following extract is from the cross-examination of Mr. Field. (Trans. p. 62):

“Q. Those samples were for what purpose?

A. Representing the salmon that they were to give me—the Archer salmon they were to deliver me.

Q. To be used by you for the purpose of issuing samples for resale?

A. Yes; they were asked for that purpose.

Q. In other words, in your business when you called on Mr. Haller to discuss the 1912 pack and your business with him, you asked him to send some samples so that you might

send them to your different customers in order for you to resell them?

A. Correct.

* * * * *

Q. *You say that you told him to send you these samples to send to your customers?*

A. Yes.

Q. And they were from the lot of salmon that you had bought?

A. That was my belief; yes."

Equally unsupported is the allegation of the fourth count that it was customary for plaintiff to receive samples of the pack in its prior dealings with defendant and to take these samples instead of the bulk of the shipment. Defendant produced and introduced in evidence a letter written by plaintiff to defendant on November 8, 1910 (Trans. p. 135) in which instructions are given to ship a portion of the do-overs contracted for in that year to Portland. As a postscript thereto, appears the following:

"Kindly send to this office one case of Acher salmon to use as sample at your earliest convenience."

In view of the fact that a part of the goods purchased in that year had already been delivered to plaintiff, this letter shows conclusively that the samples submitted in the year 1910 were for the purpose of resale. The record in this case therefore clearly indicates that defendant practiced no fraud upon plaintiff, nor did it act in such a careless or negligent manner as to amount to construc-

tive fraud, nor did plaintiff suffer any injury by reason of the samples furnished by defendant. Recovery under the fourth count of the complaint is precluded, because there is no evidence to support the same. We apprehend that plaintiff does not rely very strongly upon this count, for he devotes only a few pages in his brief to a consideration of the same.

Thus far, we have attempted to show that as to the main issue involved in this proceeding, the judgment rendered was the only possible judgment which the jury could have returned.

3. THE TRIAL COURT PROPERLY EXCLUDED THE JUDGMENT ROLLS OFFERED IN EVIDENCE BY PLAINTIFF.

The testimony of various witnesses proved that a very considerable portion of the salmon purchased by plaintiff was destroyed by the pure food authorities both federal and local. As the testimony of these witnesses was true, no contradictory evidence was offered by defendant, though we contend that such evidence was beside the issues. In addition, plaintiff asked to have the judgment rolls in the various cases in which the salmon was destroyed introduced in evidence. If such testimony had any relevancy, it was simply for the purpose of further strengthening the statements of witnesses already examined. The effect could only be cumulative and as the fact was not denied by de-

fendant, it was entirely unnecessary to introduce these documents. The court very properly excluded the same and such ruling is assigned by plaintiff as error. Counsel does not attempt to show how this testimony was relevant nor what injury his client sustained by reason of the exclusion thereof, but contents himself with the statement:

“The importance and materiality of the evidence and the prejudicial character of the court’s error in refusing to allow these records to go in evidence hardly requires comment.”

We confess our inability to appreciate the materiality of the testimony or the prejudicial character of the court’s error, in the absence of a discussion thereof by plaintiff.

4. THERE WAS NO ERROR IN THE COURT’S REFUSAL TO GIVE THE INSTRUCTIONS REQUESTED BY PLAINTIFF NOR WAS ERROR COMMITTED IN THE INSTRUCTIONS AS GIVEN.

We deem it unnecessary to enter into an extended discussion of the instructions proposed by plaintiff which were not given or were given in modified form by the trial court. Plaintiff contends that certain instructions should have been given upon the theory that the second count of its complaint could be sustained on the ground that the contract in controversy here was void. This matter has already been discussed and if our contention is correct, the court was justified in refusing to

instruct the jury as requested by opposing counsel. The instructions given were sufficient to safeguard plaintiff's rights and a reading of the same, together with the instructions proposed by plaintiff, shows that the court incorporated in its charge to the jury everything requested by plaintiff which was proper under the pleadings and the evidence.

Irrespective of the merits of this assignment of error, the record shows conclusively that no exception was properly taken to these instructions.

The rules of practice of the United States District Court for the Northern District of California, Section 91, provide:

“Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general.”

Plaintiff did not comply with this rule of court. The transcript shows that prior to the argument of the case, plaintiff submitted in writing to the court certain proposed instructions. The court charged the jury orally and did not adopt the exact language of any of the proposed instructions of either

party. When the court had concluded its instructions, the following proceedings occurred:

“Mr. KNIGHT. Will your Honor give us an exception as to each instruction requested on behalf of the plaintiff which the court did not give and each requested instruction the court gave in a modified form?

The COURT. I don't think I gave any of your instructions—I extracted the principle.

Mr. KNIGHT. I don't know whether it may be considered a modification the extraction of the principle.

The COURT. You are entitled to an exception.

Mr. WISE. I don't understand that it is your Honor's rule that such exceptions may be taken in an omnibus way, but your Honor's attention should be directed to those parts of the court's charge to which counsel excepts.”

The foregoing indicates the failure of plaintiff to specify the grounds of exception to the court's charge. Attention was directed to this omission by opposing counsel, but plaintiff did not restate his exception so as to comply with the court's rule. This rule is eminently fair and is designed to prevent the necessity of a retrial of a cause for mere technical failure to give instructions proposed by counsel. By specifying the grounds for the exception, an opportunity is given the court to correct any error inadvertently made in instructing the jury. Plaintiff's failure to specify his grounds for exception cannot be condoned because of inadvertence, as attention was directed at the time to the rule of court on this subject.

We regret that the limited time at our disposal to file this brief has prevented a more complete discussion of the points raised by plaintiff. It has been impossible for us to review all of the cases cited by counsel in support of his contentions. We believe, however, that we have sufficiently shown that the judgment in this case is fully supported by the record and that no error exists which entitles plaintiff to a new trial. Inasmuch as defendant was entitled to a judgment in its favor, plaintiff has received more than it was entitled to and cannot be heard to complain thereof. We respectfully submit that the judgment should be affirmed.

Dated, San Francisco,

October 15, 1917.

OTTO IRVING WISE,
Attorney for Defendant in Error.

No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC
COAST) (a corporation),

Plaintiff in Error,

VS. -

NORTH ALASKA SALMON COMPANY
(a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFF IN ERROR.

SAMUEL KNIGHT,

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*Attorneys for Plaintiff in Error
and Petitioner.*

FILED
MAR 8 - 1918

No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC
COAST) (a corporation),

Plaintiff in Error,

vs.

NORTH ALASKA SALMON COMPANY
(a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Plaintiff in error respectfully petitions for a rehearing hereof. This petition is not presented perfunctorily but because we believe the court has not only clearly mistaken the record but enunciated an erroneous rule for law for which there is not only no supporting authority, but on the contrary is opposed to all authority on the subject. We start with the latter first.

I.

This court says (Opinion, pp. 7, 8) that we were not entitled to an instruction, *inter alia*, that it was the duty of defendant in error to furnish salmon that was merchantable or salable or capable of being used, so that if the jury should find

“that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased, and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time”.

The surprising reason assigned by the court is that we did not tender defendant in error the sum of approximately \$1400 retained from the sales of the salmon. No authority is cited and there is no authority therefor cited in the brief which promulgated this novel proposition.

We respectfully submit that this position is untenable because

1. At the most the amount retained could only be used by defendant in error as an offset in an action for damages. It would have been an idle formality to tender a sum less than that recoverable and the law does not require it.

Said the court in the case of

Minor v. Baldridge et al, 123 Cal. 187, 191,

“The action is not based upon a breach of contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is, that the

money was obtained upon a false representation that it had become due under the contract by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event, the corporation may yet perform and become entitled to demand and enforce payment from plaintiff”.

2. This is not an action for the rescission of a contract which would call for the return of the salmon, if of any value, or its equivalent. Not only was the salmon shown to have been in great part, if not entirely, valueless, but it had been judicially or officially condemned and ordered destroyed, and as the court said in the case, similar in principle, of

Hamrah et al. v. Maloof & Co., 111 N. Y. Supp. 509,

“The suggestion that the plaintiffs have failed in any equitable consideration” (because they “have not offered to restore the goods to the defendant”) “is little less than an impertinence”.

3. *Since this is not an action on an indemnity against loss, the financial relations of plaintiff in error with third parties, purchasers of the salmon, were wholly irrelevant here.*

At the risk of unduly prolonging this petition, we quote from the very pertinent case of

Denton Bros. v. Gill & Fisher, (Md.) 62 Atl. 627, 629.

Said the Chief Justice, speaking for that court, after reciting more at length the facts of the case (*italics being ours*):

“Compressed into the narrowest compass the situation presented is this: Denton Bros. purchased from Gill & Fisher 3000 quarters of corn, and sold the same corn to Bowring & Archibald; Bowring & Archibald, through C. T. Bowring & Co., sold the same corn to Montgomery, Jones & Co. The last-named purchasers paid C. T. Bowring & Co. in full. It is alleged that there was a material shortage in the weight when the corn was delivered. Montgomery, Jones & Co. were refunded the amount of that shortage by C. T. Bowring & Co., C. T. Bowring & Co. were refunded the same amount by Bowring & Archibald, and the latter have made a demand on Denton Bros. to refund the same amount. Denton Bros. have not paid back that amount, but have sued Gill & Fisher, their vendors, to recover the sum which they, Denton Bros., are liable to pay on account of the same shortage to their vendee. The question on these facts is, *can Denton Bros. maintain this suit until they actually pay back to their vendee the amount claimed by the latter from Denton Bros. on account of that shortage?* This question is the one raised by the demurrer to the fourth count of the narr., and by the fourth instruction granted at the instance of the appellees and the second rejected prayer of the appellants. We will dispose of that question before stating or considering the other or remaining inquiry.

If Denton Bros. had not resold the grain to Bowring & Archibald, and if, after they had paid Gill & Fisher the agreed price for the entire 3000 quarters of corn purchased from the latter, it had been discovered that the vendors had in fact failed to deliver over 200,000 pounds of the corn sold and paid for, it could

not be questioned that Denton Bros. would have a sustainable cause of action against Gill & Fisher for a breach of the latter's contract. *How can the resale of the corn by Denton Bros. extinguish Gill & Fisher's obligation to comply with their contract, or exonerate them from the consequences of a breach which occasions a failure of consideration?* The right of the vendee to recover from the vendor for a failure of consideration is founded on the simple fact that the former has not received from the latter what the vendor sold and agreed to deliver, and what the vendee paid for and contracted to get. The breach consists in the failure of the vendor to live up to his contract, *and no subsequent sale of the grain by the vendee can obliterate or condone that breach.* If a sale of the same commodity by the vendee to a subvendee extinguishes the responsibility of the vendor to make good a shortage to his vendee, then a payment to the subvendee by his vendor of the damages caused by the shortage would revive the first vendor's responsibility to his vendee; and thus the obligation of the first vendor to make good a deficiency to his vendee would depend, not upon his own breach of the contract of sale, but upon a collateral and independent transaction between the vendee and a third party who is a total stranger to the original contract of sale. The adjudged cases do not support that view."

Then follows a reference to a number of cases, including the leading case of

Randall v. Raper, Ellis, Black & Ellis, 84 Q. B. 4 Jur. (N. S.) 662, 120 Eng. Rep. 438.

Also:

Dingle v. Hare, 7 C. B. N. S. 145;

Muller v. Eno et al., 14 N. Y. 597,

where the syllabus states:

“The measure of damages for a breach of warranty in the sale of goods is the difference between the value of the goods if they had corresponded with the warranty and their actual value.” And

“The vendee is entitled to recover although he has sold the goods at private sale in ignorance of the defect, and no claim has been made upon him on account of it. Nor is he required to prove the price at which he resold the goods. Such price may be evidence of the amount of damages, but does not furnish the rule of damages.”

Passinger v. Thorburn, 34 N. Y. 637; 90 Am. Dec. 753;

Western Twine Co. v. Wright, (S. D.) 78 N. W. 942; 44 L. R. A. 438;

Wheelock v. Berkeley, (Ill.) 27 N. E. 942.

See, further:

Smith v. McNair, (Kan.) 27 Am. Rep. 117.

The latest case on the subject is

Buckbee v. P. Hohenadel, Jr. Co., (C. C. A.)
224 Fed. 14,

where it is held (quoting from the syllabus) that

“The purchaser of seed warranted to be of a specified variety, and which he resells to a grower, may recover from the dealer the actual loss due to misrepresentation as to the variety although he has not liquidated his liability to the sub-vendee for breach of warranty.”

We venture to assert that no decision of an appellate court nor text writer can be found to the contrary anywhere.

II.

The jury found *in favor of plaintiff in error* (for a nominal amount of damages, however), and hence found that the salmon which was delivered by defendant in error to plaintiff in error *did not comply with the warranty* contained in the contract as to its quality, i. e., was inedible, and was contraband under the Pure Food Acts; but in discussing our assignment of errors that the verdict and the judgment entered thereon are contrary to the evidence and the court's instructions because for a nominal instead of a substantial amount, this court, apparently under the impression that the verdict was in favor of defendant in error, says (italics again ours):

“Those assignments present to us nothing for review, since this court cannot weigh the evidence, and determine whether the verdict was contrary thereto, *there having been no request that the jury be instructed to return a verdict for the plaintiff on the ground of absence of any evidence to sustain a contrary verdict.* Our province on a writ of error is limited to the review of errors in law committed by the trial court. We have nothing to do with the evidence further than to consider its relevancy to rulings of that court to which exceptions have been duly reserved” (Opinion, pp. 5, 6).

Again the court has fallen into serious error. Bearing in mind that the jury found *in plaintiff's favor*, what instruction or direction could have been requested further than is contained in plaintiff's proposed instructions that if the jury should find a substantial part of the salmon was decomposed or in process of decomposition when brought to San Francisco and delivered to plaintiff, then its sale was void and plaintiff was entitled to a verdict for \$16,961.30, with interest; or, that if the jury should find that the salmon was decomposed or contained germs producing decomposition when brought to San Francisco, and that plaintiff received it in ignorance of its true condition and relying upon its fitness for human consumption, plaintiff was entitled to a verdict for the above amount; or, that if the jury should find that the salmon was not substantially equal to the pack of the year before, then defendant had failed to comply with the warranty contained in its contract and plaintiff was entitled to recover the difference between the value which the salmon would have had at the time of delivery of the quality contracted for and its actual value at that time (Trans. pp. 162, 163, 166)? The testimony places the amount of inedible salmon all the way from 30 per cent of 2100 cases, at the very lowest, excluding "swells" (*post*), to the entire lot, i. e., from 700 cases for which \$2380 was paid (at \$3.40 a case), and whose value was \$2800 (i. e., \$4 a case), to 5000 cases for which \$16,961.30 was paid, and whose

value was \$20,000 (Trans. p. 56). *We could have gained nothing by asking for a peremptory instruction that the jury render a verdict for plaintiff in error, inasmuch as it did so; a requested instruction for a verdict in our favor for the full amount claimed would have been refused on the ground that the jury might, from the evidence, find less, and that it was for them to determine the exact amount; and a requested instruction for any specific sum less than the total price paid by plaintiff in error or total amount of damages claimed would have been a waiver by the latter of all over that specific sum. Furthermore,*

III.

To emphasize the oral testimony that at least 30 per cent of at least 2100 cases of the salmon was rotten *when it was imported and delivered to plaintiff in error* (and not merely that it was thereafter destroyed), the judgment roll in the case of *United States v. 2100 cases of salmon*, tried in the United States District Court for this district, was offered in evidence (Trans. pp. 98 *et seq.*), wherein it appeared that the court condemned and ordered destroyed 2100 cases of the salmon (Trans. p. 112) for the reasons set forth in the libel (Trans. p. 99), i. e., because the fish was filthy and decomposed *and was in that condition when shipped from Alaska to San Francisco.*

Referring to this judgment roll this court says (Opinion, p. 9) that

“No question was made of the truth of that testimony, and it was clearly unnecessary to burden the record with other evidence to the same effect”.

If the court will examine closely the various judgment rolls offered in evidence, it will observe that the decree in the one just referred to adjudged the condition of the salmon *prior* to the time of its delivery to plaintiff in error, whereas the decrees in the other cases condemned the salmon for its adulterated character appearing *after* its delivery. As we have heretofore said, the oral testimony on the subject was that a few months after its delivery, at least 30 per cent of at least 2100 cases of the warehoused salmon excluding “swells” was found bad and it was shown that must have been its condition when delivered (Trans. pp. 52, 70-74, 82, 85-86, etc.). The decree just referred to is a judicial determination of that fact after a hearing. Inasmuch as this court holds that it was not error to refuse admission in evidence of this judgment roll because it was cumulative evidence, it is apparent that at least to this extent we furnished “a *reasonable basis*” for determining the amount of a substantial verdict, the trial court having given an instruction to the jury (Trans. p. 174), theoretically correct under other circumstances but not here applicable or proper, that failure of plaintiff in the court below to furnish the jury

with "a reasonable basis" for recovery justified a verdict for nominal damages.

We are, then, in this position: We have requested the court to charge the jury that if they found the salmon inedible it was their duty to bring in a verdict for us for the amount paid therefor or for damages. The jury so found it, but ignoring the court's instruction that plaintiff in error was entitled to recover the purchase price of the salmon found spoiled, and the further instruction that plaintiff in error was "entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with," i. e., \$4 a case, "over its actual market value at that time in the condition in which it was delivered", i. e., nothing, ignoring the warranty contained in the contract as to the quality of the salmon upon which they were likewise instructed, and ignoring the established fact that at least 30 per cent of 2100 cases of the salmon was bad, they returned a verdict for \$1 damages, apparently because they believed that under some totally dissimilar circumstances not disclosed do-over salmon had not been uniformly good and that the purchaser must have contemplated such a loss when it purchased the goods.

It is apparent that the assignment of errors particularly referred to does not merit the court's criticism and does not

“import questions into a cause which the record does not show were raised and passed on in the court below” (Opinion, p. 6).

The questions were raised from the time the demurrer to the amended complaint was first presented to the time the jury was instructed, and are, we submit, fully covered by the assignment of errors.

IV.

The court says (Opinion, pp. 6, 7) that the trial court gave, in substance, certain instructions requested by us which went to the heart of the case. Briefly speaking, those instructions were to the effect that the importation by defendant in error and delivery to plaintiff in error of this salmon, if found decomposed, were against the Pure Food Laws and did not constitute a performance of the contract, and that plaintiff in error was entitled to the return of the purchase price paid therefor, or for damages. If the trial court gave these instructions as requested, how, in view of the uncontradicted and cumulative evidence, is it humanly possible to avoid the conclusion that the jury failed to follow the instructions when it rendered its verdict for only nominal damages; or how can a verdict that the salmon was inedible be reconciled, in view of the evidence, with the finding that plaintiff in error was not either substantially damaged or entitled to a return of any of the purchase price?

The trial court, however, refused to give these instructions as requested without adding a qualifying element, to wit, the character of the goods (Trans. p. 169) as do-overs or reprocessed salmon, despite the pure food laws which recognize no such qualification, despite the warranty in the contract that the salmon should be equal in quality to the pack of the year before, i. e., perfectly edible, despite the fact that do-over salmon was recognized by the Government as a legitimate subject of commerce (Trans. p. 97), and despite the unquestioned high character of do-over fish that defendant in error had previously furnished to plaintiff in error for several successive years. In other words, the court, in substance, told the jury that if reprocessed salmon was more liable to be bad than prime salmon, defendant in error could, without violating the law or its contract, bring in a greater quantity of inedible fish of the former quality than of the latter, and hold the purchaser to his bargain just as if the salmon were edible—an utterly indefensible instruction and at variance with the earlier instructions on the subject.

We respectfully insist that the trial court did not substantially give these instructions as requested by us, but so modified or qualified them as to entirely change their character. As another instance, we asked for an instruction that if the jury found a substantial part of the canned salmon to be, when received, either decomposed or in process of decomposition, i. e., as in the case of after

developed “swells” which were shown uncontradictedly to have been in course of decomposition when delivered, plaintiff in error was entitled to a verdict for the full amount of the purchase price (Trans. pp. 162, 167 *et seq*). The court below, however (Trans. p. 168), instructed the jury that no recovery could be had for loss sustained through swells developing *after* the inspection of the salmon made on behalf of defendant in error, i. e., for cans, *the decomposition of whose contents had not then become evident but which, according to the testimony, had, when delivered, commenced to decompose and were unfit for human consumption and adulterated within the meaning of the law*—a modification of the instruction which not only destroyed its effect but also tended to cause uncertainty in the minds of the jurors as to how many tins belonged to one class and how many to the other.

V.

Again we find fault with the court’s reasoning (Opinion, p. 8) by which it reaches the conclusion that we were not entitled to the instructions requested because it was

“not contended that the contract was void at its inception or that the defendant had knowledge when the goods were shipped that any particular portion of them was unfit for consumption”,

or because the salmon in question “was a doubtful commodity”. The fact that the contract was not

void at its inception or that the defendant's officers were ignorant of the fact that when the goods were shipped a large or in fact any portion of them was unfit for consumption by reason of negligence little short of criminal, on the part of some of its employees, has, we submit, no discernible bearing upon the case.

The Pure Food laws, passed to prevent just such an occurrence as that giving rise to the present controversy, were supposed to be fortified by the warranty which defendant in error gave to plaintiff in error and which was designed to protect the latter against just such an imposition as was practiced here. These legislative and contractual precautions will have been taken in vain if this judgment is finally affirmed.

Of course, if the contract had been void because calling for rotten salmon no recovery could have been had, not because these salutary laws were inoperative, but because plaintiff in error would have been *in pari delicto* with defendant in error, and, furthermore, would have obtained what it had bargained for. It is of no consequence who were responsible for the canning of this salmon and what information any of the defendant's officers had on the subject before its delivery. The gist of the case is well epitomized by the court in the case of

Tyler v. Bailey, 71 Ill. 34,
where it was said:

“In a suit to recover on a total failure of consideration, the measure of damages is, the money paid, with interest from the day of its payment till the time of recovery. This is believed to be a rule without exception. In fact, we do not perceive how any other just rule could be adopted. Appellee has received no benefit from having received these spurious warrants, he has been deprived of the use of his money, and fair dealing would require that he should, at least, recover it back, with legal interest. It then follows that the court below did not err in telling the jury that the measure of damages was the price paid, with legal interest, from the day it was paid”.

Whether or no the defendant in that case knew that the warrants were spurious before they were delivered had no bearing on the case, and it was the validity rather than the invalidity of the contract that gave appellee there his standing in court.

To summarize, the *crux* of our contention was and is that under the Federal and State Pure Food Acts, as well as under the warranty as to quality contained in the contract, the vendor was obliged to deliver to the vendee the salmon in an edible condition. We proved, and the jury found, that the vendor failed in its duty, but, nevertheless, this court says that the vendee is remediless,

(1) Because it did not tender back to its vendor a small sum left in its hands on resales of the merchandise to its subvendees; and

(2) Because this quality of salmon, known as do-overs, had on other occasions and at other times

not proven uniformly good, and being an object of suspicion, virtually called for the application of the doctrine of *caveat emptor*.

The Pure Food Acts and warranty are, by force of this decision, thrown to the winds as “a mere scrap of paper”. It cannot be that this court proposes to promulgate such a doctrine and unwittingly lend itself to the consummation of such an unconscionable as well as illegal transaction.

VI.

We may observe that the trial court when it finally charged the jury treated the complaint as one for money had and received, i. e., for return of money paid on failure of consideration, as well as for damages arising from the same facts, although by reason of the court’s ruling in sustaining the demurrer to the third count of the amended complaint sounding in damages, plaintiff in error was precluded from proving damages outside of the market price of the salmon at the time of its delivery. While this court has in its opinion overlooked our contention that the demurrer to this third count was improvidently sustained, no reason having ever been assigned therefor and none discoverable by us by the exercise of reasonable diligence, nevertheless, as before observed, the prejudicial character of the error has been somewhat affected by the fact that the trial court repeatedly charged the jury despite its ruling on

demurrer that this was an action for damages (Trans. pp. 169, 170, 171, 174, 177), as well as for a return of the purchase price of the salmon.

We respectfully submit that a new trial of this cause should be granted for the reasons we have stated.

Dated, San Francisco,
March 6, 1918.

SAMUEL KNIGHT,
F. E. BOLAND,
*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as fact and that said petition is not interposed for delay.

Dated, San Francisco,
March 6, 1918.

SAMUEL KNIGHT,
*Of Counsel for Plaintiff in Error
and Petitioner.*

No. 2974

IN THE

United States Circuit Court of Appeals 5

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC
COAST) (a corporation),

Plaintiff in Error,

VS.

NORTH ALASKA SALMON COMPANY
(a corporation),

Defendant in Error.

REPLY OF DEFENDANT IN ERROR TO
PETITION FOR A REHEARING ON BEHALF OF
PLAINTIFF IN ERROR.

OTTO IRVING WISE,
Attorney for Defendant in Error.

FILED
MAR 28 1918
F. D. C. 100-10000

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REPLY OF DEFENDANT IN ERROR TO PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

Pursuant to permission granted, this answer is filed, though the time allotted for the preparation thereof is so limited that we cannot answer at length the contentions urged by plaintiff in error in its petition for rehearing. There is nothing in the petition which has not already been fully treated in the briefs heretofore filed in this matter, and we respectfully direct the court's attention to our brief filed prior to the submission of the cause, as well as the opinion of the court itself.

While plaintiff in error has stated its cause of action is not one for rescission, nor for damages, nor for an indemnity against loss, we find no statement anywhere in the petition for rehearing in which the court is advised upon what theory it bases its right to recovery.

We assume that it is the theory of plaintiff in error that the delivery by defendant in error of salmon which did not comply with the requirements of the Pure Food Law caused a failure of consideration which entitles it to a return of the purchase price paid for the salmon. If this assumption is correct, it was the duty of plaintiff in error to rescind the contract on the ground of failure of consideration and to make restoration of any moneys received by it on account of the sale of the salmon.

Under Section 1689 of the Civil Code of California

“a party to a contract may rescind the same in the following cases only * * *

3. If the consideration becomes entirely void from any cause.”

As to the manner of rescission, Section 1691 provides:

“He must restore to the other party everything of value which he has received from him under the contract or may offer to restore the same upon condition that such party shall do likewise.”

If the amount received had been a trifling sum, it might be argued that the failure of plaintiff in

error to return such sum would not preclude it from recovering in this action, but the undisputed testimony shows that it received at least \$2590 from the sale of the salmon. Certainly no court of equity will permit it to retain the benefit of the contract and at the same time recover the entire purchase price on the theory that the commodity delivered to it was absolutely worthless.

Two contentions of defendant in error raised on this appeal have been entirely disregarded in the petition for rehearing. Plaintiff in error has assumed in its brief that the contract for the salmon was rendered void by the delivery of salmon which did not comply with the requirements of the Pure Food Law. No attempt is made to answer the cases cited by us and particularly that of *Fox v. Rogers*, 171 Mass. 546, in which a contract, valid in its inception, was held not to be rendered void by any illegality in performance.

Furthermore, in its petition, plaintiff in error omits any reference to the contract itself, which provides that no claim for reclamation shall be made after delivery. This matter was fully treated in our previous brief and we feel it unnecessary to repeat the argument there contained, but we respectfully submit that this clause of the contract precludes any recovery in the action at bar.

Plaintiff in error asserts that the trial court erred in refusing to admit in evidence the judgment rolls in actions in which portions of the salmon were destroyed by order of the pure food authorities.

His present contention is that these records should have been accepted to show the condition of the salmon at the time it was shipped from Alaska. But clearly, evidence taken in another action in which defendant in error was not a party could not have been used against it in this proceeding.

The opinion of this court disposes of the position assumed by plaintiff in error previously on this appeal with reference to the judgment rolls.

We respectfully submit that all of the contentions now made by plaintiff in error were fully passed upon by the court in determining this case; that no error has been shown in the decision, and therefore the judgment of the District Court should be affirmed and the petition for rehearing denied.

Dated, San Francisco,

March 27, 1918

OTTO IRVING WISE,
Attorney for Defendant in Error.

No. 2975

United States
Circuit Court of Appeals 6
For the Ninth Circuit.

COGGESHALL LAUNCH COMPANY, a Corporation,

Appellant,

vs.

ELIZA A. EARLY, Claimant,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States District Court for the Northern
District of California, Southern Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel “AN-
TELOPE,” for Limitation of Liability.

Amended Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon appeal heretofore perfected in this court and include in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) All those papers required by Section I of paragraph I of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit excluding the testimony taken on the reference to ascertain value, and excluding any and all Briefs filed upon any question in this cause.

(2) All the pleadings with the exhibits annexed thereto.

(3) The monition and all proceedings taken, made and returned by the United States Marshal to this court.

(4) All the testimony and other proof adduced in the cause.

(5) The opinion of the court.

(6) The final decree and notice of appeal.

(7) The assignment of errors.

CLARENCE COONAN,
NAT. SCHMULOWITZ,

Proctors for Petitioners and Appellant Coggeshall
Launch Company. [1*]

Due service of a copy of the original Praecipe for
Apostles on Appeal and the Amended Praecipe for
Apostles on Appeal hereby admitted this 14th day
of March, 1917.

W. ERNEST DICKSON.

[Endorsed]: Filed Mar. 16, 1917. W. B. Mal-
ling, Clerk. By C. W. Calbreath, Deputy Clerk.
[2]

Statement of Clerk U. S. District Court.

*In the Southern Division of the District Court of
the United States, Northern District of Califor-
nia, First Division.*

TITLE OF CAUSE.

No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corp., and HAM-
MOND LUMBER COMPANY, a Corp.,
Owners of the Steam Vessel "ANTELOPE,"
For Limitation of Liability.

ELIZA A. EARLY, Claimant.

*Page-number appearing at foot of page of original certified Apostles
on Appeal.

PARTIES.

Petitioners for Limitation of Liability of Steam Vessel, "Antelope," Coggeshall Launch Company, a Corp., and Hammond Lumber Company, a Corp.

Claimant: Eliza A. Early. [3]

PROCTORS.

for

Petitioners and Appellants: Clarence Coonan, Esq., Eureka, Calif., and Nat. Schmulowitz, Esq., San Francisco.

Claimant and Appellee: W. Ernest Dickson, Esq., Eureka, Calif.

PROCEEDINGS.

1915.

March 19. Filed verified Petition of COGGES-
HALL LAUNCH COMPANY, a
corporation and HAMMOND LUM-
BER COMPANY, a corporation,
owners of the Steam Vessel "Ante-
lope," for Limitation of Liability.

March 20. Filed Order referring case to Francis
Krull, U. S. Commissioner, for Ap-
praisement of Steam Vessel, "Ante-
lope."

April 27. Filed Report of Francis Krull, U. S.
Commissioner, on reference for ap-
praisement of Steamer "Antelope,"
and testimony taken on said reference.
Filed Notice of Appraisement.

May 5. Filed Order Approving Report of
Francis Krull, appraising the value

of Steamer "Antelope" at \$8,005.00, and ordering Petitioners to file a bond in said sum of \$8,005.00, with interest from September 15th, 1915. Filed Notice of Filing Report of Commissioner. [4]

June 24. Filed Bond of Petitioners, in the sum of \$8,005.00, with interest, etc., with Fidelity and Deposit Company of Maryland, as surety thereon.

Filed order for monition to issue, citing all persons claiming damages, etc., to appear before Francis Krull, U. S. Commissioner, and file their claims.

28. Issued Monition to all persons claiming damages, etc., to appear before Francis Krull, U. S. Commissioner, and file their claims, which monition was afterwards, on April 9th, 1917, returned and filed, with U. S. Marshal's Return attached thereto.

28. Filed application for Restraining Order. Filed Restraining Order, restraining Claimant herein from further prosecuting certain action heretofore brought in the Superior Court of the State of California, County of Humboldt.

July 15. Filed Claim of Eliza A. Early in the sum of \$7,500.00.

19. Filed Answer of Eliza A. Early.

August 9. Filed Notice of Motion to Dissolve Restraining Order.

November 19. Filed Opinion in which it was ordered that the motion to dissolve the restraining order be denied.

1916.

July 6. This cause, this day, came on for hearing, in the District Court of the United States, for the Northern District of California, held at Eureka, California before the Honorable, M. T. Dooling, Judge. Further hearing was had on July 7th, 1916, on which day the Court ordered the matter submitted. [5]

1917.

January 23. The Court, this day, filed an opinion, denying the motion for judgment on the pleadings, ordering a decree to be entered, limiting the liability as prayed, and ordering the entry of a decree, in favor of claimant, in the sum of \$5,000.00 and costs, against the Coggeshall Launch Company.

February 5. Filed order for entry of Decree in favor of claimant.

Filed Final Decree.

19. Filed Notice of Appeal, by petitioner.

23. Filed order allowing bond of petitioner, heretofore given, to be used

and considered as the bond staying execution on appeal.

Filed cost on bond on appeal, in the sum of \$250.00, with Samuel S. Silkwood and William T. Armstrong, as sureties.

March 16. Filed Assignment of Errors. [6]

In the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Petition for Limitation of Liability.

To the Hon. MAURICE T. DOOLING, Judge of the United States District Court for the Northern District of California, Sitting in Admiralty:

The petition of the Coggeshall Launch Company, and Hammond Lumber Company for Limitation of Liability, civil and maritime, respectively shows:

I.

That petitioner herein, Coggeshall Launch Company, is a corporation organized, created and existing under and by virtue of the laws of the State of California, with its principal place of business in the city of Eureka, County of Humboldt, State of California.

II.

That petitioner herein, Hammond Lumber Company, is a corporation organized, created and existing under and by virtue of the laws of the State and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the city and county of San Francisco, State of California. [7]

III.

That Coggeshall Launch Company and Hammond Lumber Company are, and at all times herein mentioned were the owners of the steam "Antelope," together with its engines, boilers, boats, tackle, apparel, furniture, and appurtenances.

IV.

That said steam vessel "Antelope" is an American vessel of 101 net tons burden, and duly enrolled according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and said vessel is now in the port of Eureka in the Northern District of California, and within the jurisdiction of this Honorable court.

V.

That Coggeshall Launch Company, without participation of any character therein by the Hammond Lumber Company, for a long time past has operated, and on the 15th day of January, 1915, was operating a ferry system upon Humboldt Bay, in the State of California, between the city of Eureka and the town of Samoa, using and employing in that connection, among other vessels, the steam ves-

ssel "Antelope"; that on said 15th day of January, 1915, said steam vessel "Antelope" departed from the town of Samoa in accordance with a schedule maintained and adhered to by Coggeshall Launch Company on a voyage across Humboldt Bay to the city of Eureka; that on said voyage the steam vessel "Antelope" carried, among its passengers, one George D. Early, who rode and was carried on the lower of the two decks of the steam vessel "Antelope"; that on said lower deck there was and is a doorway through which freight was and is loaded upon, and discharged from the lower deck of said steam vessel; that when said doorway is and was not being used for the purpose of either loading freight upon, or discharging freight from, said lower deck, it is and was closed by a heavy sliding door; that before the departure of said steam vessel from the town of Samoa on the voyage above referred to, [8] on the 15th day of January, 1915, said doorway was closed by drawing to the sliding door above referred to; that on said voyage, said George D. Early, either by himself or in company with others, and without the consent or permission, or knowledge, of the petitioners, or either of them, or of any of their employees, or any employee of either of them, and without any authority so to do, shoved back said sliding door, thus opening said doorway; that it is the custom and practice of Coggeshall Launch Company and its employees to protect said doorway, when open, by placing about four feet from the floor of the deck a heavy horizontal bar across said opening, fitting the ends thereof into lugs or

brackets fastened on either upright jamb of said doorway, and locking said bar by inserting a pin on one end thereof, but on this occasion said sliding door having been shoved back without its knowledge or privity, or permission, or the knowledge, or privity or permission of its employees, and without the consent or authority of the Coggeshall Launch Company or any of its employees, said iron bar was not so placed, and said opening was unprotected; while said doorway was in said condition said George D. Early fell through the same into the waters of Humboldt Bay and was drowned.

VI.

That after the drowning of said George D. Early, said steam vessel "Antelope" proceeded on its voyage to Eureka, and said steam vessel "Antelope" is now in the same condition as it was at the close of its aforesaid voyage.

VII.

That said steam vessel "Antelope" was, at all times herein mentioned, and is now, used and employed by Coggeshall Launch Company in the business of transporting passengers and freight on Humboldt Bay between the city of Eureka and the town of [9] Samoa, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, and during all of said times was a good, staunch, able, and seaworthy vessel, and was at all times properly manned, officered, equipped, supplied and appareled, and well and sufficiently fitted with suitable boilers, machinery, lines, boats, tackle, apparel, appliances and stores, all in good order and

condition, and sufficient for the business and voyage in which it was engaged, and particularly for the transportation of persons.

VIII.

That the drowning of said George D. Early, and all other damages and injuries, whether of persons, or property, done, occasioned and incurred on said voyage of said steam vessel "Antelope" were done, occasioned, and incurred without the consent or privity, or knowledge or design or neglect of the petitioners, or either of them, or of the directors or officers or servants of petitioners, or either of them, or of said steam vessel "Antelope."

IX.

That Eliza A. Early, a resident of the city of Eureka, State of California, who alleges that she is the mother of George D. Early, has heretofore commenced on the 3d day of February, 1915, in the Superior Court of the State of California, in and for Humboldt County, an action against the petitioners, wherein recovery is sought for the sum of Fifty Thousand (\$50,000) Dollars for the loss of the life of George D. Early, through drowning; that said claim is greater than the value of the steam vessel "Antelope," and freight pending which, according to the best knowledge, information and belief of the petitioners, is of a value not in excess of Fourteen Thousand (\$14,000) Dollars; that the said action of Eliza A. Early has been commenced within the jurisdiction of this Honorable Court; that the said claim of [10] Eliza A. Early is the only claim, as far as the petitioners know, that has been

made for injuries, or losses, or damages, either to person or property, caused or occasioned or incurred on said voyage; that W. Ernest Dickson, Esq., appears as attorney for said Eliza A. Early.

X.

That your petitioners desire to contest their liabilities, and the liability of either of them, and the liability of the steam vessel "Antelope" for the injuries, losses, and damages, whether to persons or to property, caused, occasioned or incurred on said voyage, and particularly in regard to the drowning of said George D. Early, and also hereby claim the benefit of limitation of liability of your petitioners, provided for in Secs. 4282 and 4289, inclusive, of the Revised Statutes of the United States, and also hereby claim the benefit of limitation of liability of your petitioners provided for in the Act of June 26, 1884, and particularly the benefit of provisions of Sec. 18 of said Act (23 Stat. at L. 57), and also hereby claim the benefit of limitation of liability provided for in Section 4289 of the Revised Statutes of the United States as amended by the Act of June 19, 1886 (24 Stat. at L. 79), and particularly Sec. 4 of the last mentioned Act, and also hereby claim the benefit of any and all Acts of Congress of the United States, if any, amendatory of several sections and acts aforesaid, or any thereof; and your petitioners are now ready, able and willing, and hereby offer to give its stipulation or stipulations with sufficient sureties, conditioned for the payment into this Court by your petitioners of the value of said steam vessel "Antelope," if required, as it was

immediately after the termination of said voyage upon which said George D. Early was drown, with interest thereon, together with its freight, pending, if any was pending, such payment to be made whenever the same shall be ordered herein. [11]

XI.

While not in any way admitting your petitioners, or either of them, to be under any liability for the losses or damages occurring as aforesaid, and your petitioners, and each of them reserving the right to contest in this Court any liability therefor, either personally or of said steam vessel "Antelope," your petitioners, and each of them, claim, and are entitled to have limited their liability, or the liability of either of them, if any, in the premises, to the amount of the value of their interest, or the interest of either of them, as aforesaid, in said steam vessel "Antelope," at the close of said voyage.

WHEREFORE your petitioners pray that this Court will order due appraisement to be had of the value of the steam vessel "Antelope," its boilers, engines, boats, tackle, apparel, furniture, and appurtenances as the same were immediately after the close of its aforesaid voyage, and order and cause due appraisement to be had of the amount of the freight pending, if any, at the close of said voyage, and that stipulation or undertaking may be given by your petitioners, with sureties, conditioned upon the payment into Court of such appraised value, whenever the same shall be ordered, and that this Court will, upon filing of such stipulation by your petitioners, issue or cause to be issued, a monition against Eliza

A. Early and all other persons claiming damage of your petitioners, or either of them, by reason of injuries to person or property occurring or arising on said voyage, or resulting from the drowning of George D. Early, citing them and each of them to appear before this Court and there make due proof of their respective claims, at a time therein named, as to all of which claims your petitioners, and each of them, will contest their liability and the liability of the steam vessel "Antelope" independently of the limitation of their liability, and the liability of each of them, claimed under the statutes and sections above stated.

That this Court may be pleased to determine that no [12] liability exists on the part of your petitioners or either of them, or of the steam vessel "Antelope," for any act or thing done or omitted to be done, or occasioned by said steam vessel "Antelope," on said voyage on which George D. Early was drowned,—and particularly that no liability exists on the part of your petitioners, or either of them, for the drowning of said George D. Early, and that this Court may be pleased to release the stipulation for the value of said steam vessel "Antelope," and her freight, if any, pending, for the reason that neither said steam vessel nor her officers, nor crew, participated in the drowning of said George D. Early.

That in case it shall be found that any liability exists on the part of your petitioners, or either of them, by reason of injuries to persons, or loss of, or damage to property, done, occasioned or incurred

on said voyage, and particularly the drowning of said George D. Early, as aforesaid (which your petitioners deny and pray may be contested in this court), then that such liability shall in no event be permitted by this Court to exceed the value of the steam vessel "Antelope," and her freight, if any, pending, at the close of its voyage, upon which said George D. Early was drowned, as aforesaid, and as such value may be determined by the appraisement of such interests as hereinbefore prayed; and that the moneys secured be paid into court, as aforesaid, shall and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants, in proportion to the amounts of their respective claims, as by this Court adjudged; and that in the meantime, and until final judgment of this Court shall be rendered and entered herein this Court shall enter an order restraining said Eliza A. Early and her attorney from further prosecuting said suit numbered 7173, or any other suit heretofore commenced in the Superior Court of the State of California in and for the county of Humboldt, and restraining said Eliza A. Early, and all other [13] persons, from prosecuting any suits against your petitioners, or either of them, or said steam vessel "Antelope," save in this Court, only, in respect to the loss of life by George D. Early by drowning, and any and all claims arising upon said voyage as aforesaid, and that your petitioners, and each of them, may have and receive such other and further

relief as shall be deemed meet and equitable.

CLARENCE COONAN,
MAHAN & MAHAN,

Advocates.

COGGESHALL LAUNCH COMPANY,

By WALTER COGGESHALL,

President.

HAMMOND LUMBER COMPANY,

By W. S. BURNETT,

Vice-President. [14]

United States of America,

State of California,

County of Humboldt,—ss.

Walter Coggeshall, being first duly sworn, deposes and says:

That he is the president of the petitioner Coggeshall Launch Company, a corporation, and as such president is authorized to make, verify and file the petition herein on behalf of said company; that he has read the foregoing petition, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowledge, information and belief, true, as stated therein and set forth.

WALTER COGGESHALL,

Subscribed and sworn to before me this 11th day of March, 1915.

[Seal]

A. B. ADAMS,

Notary Public in and for the County of Humboldt,
State of California. [15]

United States of America,
State of California,
County of Humboldt,—ss.

W. S. Burnett, being first duly sworn, deposes and says:

That he is the vice-president of the petitioner Hammond Lumber Company, a corporation, and as such vice-president is authorized to make, verify and file the petition herein on behalf of said company; that he has read the foregoing petition, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowledge, information and belief, true, as stated therein and set forth.

W. S. BURNETT,

Subscribed and sworn to before me this 19th day of March 1915.

[Seal]

T. L. BALDWIN,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 19, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [16]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

Order Referring Matter to Commissioner for Appraisement.

It appearing to this Court that a petition for limitation of liability has heretofore been filed herein by the above-named petitioners, owners of the steam vessel "Antelope," and application having been made in open court for an order appointing appraisers to appraise the value of the steam vessel "Antelope," her engines, boilers, tackle, apparel, furniture, and appurtenances, together with its freight pending at the close of the voyage, mentioned in said petition for liability, and good cause therefor being shown,

IT IS HEREBY ORDERED that the above-entitled matter be, and the same is hereby referred to Hon. Francis Krull, United States Commissioner, for the purpose of making due appraisement of the steam vessel "Antelope," its boilers, engines, boats, tackle, furniture, and appurtenances, as the same existed at the close of its voyage upon which George D. Early lost his life through drowning, together with the amount of its freight pending, if any existed, and upon the making of said appraisement that the same be forthwith reported to this Court, and

BE IT FURTHER ORDERED that at least 10 days' notice be given said Eliza A. Early at her residence in the city of Eureka, State of California.

[17]

Entered this 20th day of Mch., 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 20, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

(Affidavit of Service of Notice of Appraisement, and Order Referring Matter to Commissioner for Appraisement.)

State of California,

County of Humboldt,—ss.

J. A. Montgomery, being duly sworn, deposes and says: I am and was at all times herein mentioned a male citizen of the United States and a resident of the County of Humboldt, State of California, over the age of twenty-one years, and not a party to the within action or proceeding; that on the 25th day of March, 1915, in the city of Eureka, county of Humboldt, State of California, I personally served a true copy of the within and annexed NOTICE OF APPRAISEMENT and ORDER REFERRING MATTER TO COMMISSIONER FOR APPRAISEMENT on Eliza A. Early, the person named therein, and personally known to me to be the person named therein, by them and there delivering to said Eliza A. Early personally at her residence in the city of

Eureka, State of California, a copy of said NOTICE OF APPRAISEMENT and ORDER REFERRING MATTER TO COMMISSIONER FOR APPRAISEMENT and at the same time and place I served in like manner a copy of the PETITION FOR LIMITATION OF LIABILITY in the above-entitled matter on said Eliza A. Early.

J. A. MONTGOMERY.

Subscribed and sworn to before me this 25th day of March, A. D. 1915.

[Seal]

L. E. MAHAN,

Notary Public in and for the County of Humboldt,
State of California. [19]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

Notice of Appraisement.

To Eliza A. Early, Eureka, California:

YOU ARE HEREBY NOTIFIED that the undersigned, the duly appointed Commissioner to appraise the value of the steam vessel “Antelope,” its engines, boilers, boats, tackle, apparel, furniture and appurtenances, together with its freight pending at the close of the voyage mentioned in the petition for limitation of liability filed herein, will make said

appraisement at his office in the Postoffice building, city of San Francisco, State of California, on Tuesday, the 6th day of April, 1915, at the hour of 2 o'clock P. M., pursuant to an order of the above-entitled Court, a copy of which is attached hereto.

Dated San Francisco, California, March 22, 1915.

[Seal]

FRANCIS KRULL,

United States Commissioner.

(Here follows copy of order referring matter to commissioner for appraisement.)

[Endorsed]: Filed Apr. 27, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

*In the District Court of the United States for the
Northern District of California.*

#15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

**(Report of U. S. Commissioner on Reference to
Appraise Value of Steamer “Antelope,” etc.)**

Pursuant to the *court* made herein on March 20th, 1915, referring the above-entitled matter to me as United States Commissioner, for the purpose of making appraisement of the interests of said petitioners in the steam vessel “Antelope,” her boilers, engines, boats, tackle, apparel, furniture and appurtenances, as the same existed at the close of her voyage of January 15, 1915, mentioned in the peti-

tion herein, together with the amount of the freight then pending, if any existed, I have to report that I was attended by Clarence Coonan, Esqr., as proc-tor for the petitioners, no appearance being made on behalf of any claimant. The proceedings here-unto annexed and made a part hereof, were had as therein set forth.

From the evidence adduced before me, it appears that the steamer "Antelope" was built by the Hammond Lumber Company, one of the petitioners, about six years ago as a "makeshift" to carry its workman from Eureka to its lumber-mills at Samoa and return, on the Bay of Humbolt. The hull cost about \$6,000, and her engines were taken from the hull of an old steamer by the same name. The en-gines are reported to have been in use for the past twenty or thirty years. The dimensions of the "Antelope" [21] are 108 feet long by 22 feet beam; her engines developing something like 180 horsepower. She is engaged in the carrying of freight and passengers on Humboldt Bay.

It does not appear that the vessel really has a market value. She is only valuable for the service in which she is now engaged, and this service is greatly dependent upon the good will and a contract with the Hammond Lumber Company, to carry its workman to and from its mills. The purchase of the vessel by one of the petitioners from the other, at a price that seems much out of proportion to her actual value, was induced by business considerations that made it a necessity for the purchaser to own the vessel.

After a careful consideration of the elements entering into the value of the steamer "Antelope" as set forth in the evidence, I am disposed to and do hereby appraise her value at the close of the voyage mentioned in the petition herein, to be \$8,000, and her freight pending as the close of said voyage, I find to be the sum of \$5.

All of which is respectfully submitted.

Dated April 27, 1915.

[Seal]

FRANCIS KRULL,
United States Commissioner, Northn. Dist. of California.

(Filed with and as a part of Reporter's Transcript of Testimony.)

[Endorsed]: Presented in open court and filed Apr. 27, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [22]

In the District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Notice of Filing Report on Appraisement.

To Eliza A. Early, and to W. Ernest Dickson, Her Proctor:

PLEASE TAKE NOTICE that we have caused to be filed in open court this 27th day of April, 1915,

the report of Commissioner Francis Krull, appraising the value of the interest of petitioners herein on the steam vessel "Antelope," as well as the value of the freight pending at the termination of its voyage, referred to more particularly in the petition for limitation of liability herein.

Dated San Francisco, Cal., this 27th day of April, 1915.

CLARENCE COONAN,
Proctor for Petitioners. [23]

State of California,
County of Humboldt,—ss.

L. E. Mahan, being first duly sworn, deposes and says: I am and was at all times herein mentioned a male citizen of the United States, and a resident of the County of Humboldt, State of California, over the age of twenty-one years; that on the 29th day of April, 1915, in the City of Eureka, County of Humboldt, State of California, I personally served a true copy of the within and annexed NOTICE OF FILING REPORT OF COMMISSIONER, on W. Ernest Dickson, Proctor for Eliza A. Early, named in said notice, and personally known to me to be the person named therein, by then and there delivering to said W. Ernest Dickson personally, at said time and place a copy of said Notice of Filing Report on Appraisement.

L. E. MAHAN.

Subscribed and sworn to before me this 29th day of April, 1915.

[Seal] J. P. MAHAN,
Notary Public in and for the County of Humboldt,
State of California.

Service of the within Notice of Filing Report of Commissioner is hereby admitted this 29th day of April, 1915.

W. ERNEST DICKSON,
Proctor for Eliza A. Early.

[Endorsed]: Filed May 5, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 5th day of May, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition for Limitation of Liability of the Steam Vessel "ANTELOPE," etc.

(Minutes—Order Approving Report of Commissioner, etc.)

On motion of Clarence Coonan, Esq., proctor for petitioners herein, and after considering the records herein, the Court ordered that the report of the United States Commissioner filed herein on April 27th, 1915, as to the appraisement of petitioners' interests herein and the freight pending at the termination of voyage in question be, and the same is hereby, approved. Further ordered that petition-

ers herein file an undertaking (bond) with good and sufficient surety in the sum of \$8,005, with interest thereon from the 15th day of September, 1914, conditioned for the payment unto this court by said petitioners of the value of said steam vessel "Antelope," etc., as fixed by said report of Commissioner, whenever the same be ordered by this Court. [25]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Order Approving Report of Commissioner Appraising Value of Interests of Petitioners in Steam Vessel "Antelope."

It appearing to this Court that the Coggeshall Launch Company, a corporation, and Hammond Lumber Company, a corporation, petitioners herein, filed in this court, on the 19th day of March, 1915, their petition for limitation of liability, wherein, among other things, they prayed that an order be entered appraising the value of the interests of petitioners in the steam vessel "Antelope," its boilers, engines, boats, tackle, apparel, furniture and appurtenances, as the same were immediately after the close of its six o'clock voyage from the town of

Samoa to the city of Eureka, on the 15th day of January, 1915, for the loss, or losses, arising on that voyage, upon which limitation of liability was sought, together with any freight pending; and

It appearing that upon the 20th day of March, 1915, this Court entered an order referring the matter of said appraisement to the Honorable Francis Krull, United States Commissioner, for the purpose of making due appraisement of the interests of said petitioners in said steam vessel "Antelope," its boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the close of the voyage aforesaid, together with the amount of its freight pending; and.

It further appearing that on the 26th day of March, 1915, [26] due and regular notice was given by said Commissioner to Eliza A. Early, of the city of Eureka, State of California, notifying the said Eliza A. Early that said Commissioner would make appraisement of said steam vessel "Antelope," its engines, boilers, boats, tackle, apparel and appurtenances, together with its freight pending, at the close of that voyage hereinabove mentioned, and also set forth in the petition for limitation of liability, at the office of the said United States Commissioner, in the Postoffice Building, city of San Francisco, State of California, on Tuesday, the 6th day of April, 1915, at the hour of 2 o'clock P. M., pursuant to an order entered in the above-entitled court, a copy of which order was attached to said notice; and

It further appearing that a hearing was had be-

fore said Commissioner at the aforesaid time and place, pursuant to said notice, at which hearing petitioners appeared by Clarence Coonan, Esq., and the claimant herein, Eliza A. Early, failed to make an appearance, and that testimony was taken by said Commissioner, and that thereafter said hearing was continued from time to time until the 10th day of April, 1915, at 11 o'clock A. M. of said day, on which date the taking of testimony in the matter of said appraisement was concluded; and

It further appearing that there was filed in open court on the 27th day of April, 1915, the report of Commissioner Francis Krull, appraising the value of the interests of said petitioners in the steam vessel "Antelope," its boilers, engines, boats, tackle, apparel and furniture, and appurtenances, at the sum of Eight thousand (\$8,000) Dollars, and further finding that the freight pending at the termination of the voyage hereinabove referred to was in the sum of Five Dollars (\$5); and

It further appearing that due notice of the filing of the report of said Commissioner was given said claimant, Eliza A. Early, on the 29th day of April, 1915; and [27]

It further appearing that more than four (4) days have elapsed, within which time, under the rules of this Court, exceptions to the report of the Commissioner may be filed, and that no exceptions have been filed; and

The Court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the report of the Honorable Francis

Krull, United States Commissioner, heretofore filed herein, on the 27th day of April, 1915, appraising the value of the interests of the Coggeshall Launch Company and Hammond Lumber Company, petitioners herein, in the steam vessel "Antelope," her boilers, engines, boats, tackle, apparel, furniture, and appurtenances, at the sum of Eight Thousand Dollars (\$8,000), at the termination of the voyage more particularly set forth above, be, and the same is hereby approved; and

BE IT FURTHER ORDERED that the report of said Commissioner, hitherto filed herein, on the 27th day of April, 1915, finding that there was freight pending at the termination of that voyage more particularly set forth above, in the sum of Five Dollars (\$5), be, and the same is hereby approved; and

BE IT FURTHER ORDERED that the said petitioners file with this Court an undertaking, with good and sufficient surety, in the sum of Eight thousand and Five Dollars (\$8,005), with interest thereon from the 15th day of September, 1915, conditioned for the payment into this court, by said petitioners, of the value of the said steam vessel "Antelope," as fixed by the report of the appraiser, heretofore filed and approved herein, whenever the same may be ordered by this Court.

Entered this 5 day of May, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 5, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 24th day of June, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition to Limit the Liability of the Owners of the Steam Vessel "ANTELOPE," etc.

(Minutes—Order for Monition to Issue.)

In this matter after considering the records herein, the Court ordered that a monition issue out of this court against all persons claiming damages occurring or arising upon a certain voyage of the Steam Vessel "Antelope," referred to in the petition filed herein, citing them to appear before United States Commissioner Francis Krull and make due proof of their respective claims, at or before a certain date to be named in said monition, not later than three months from the issuing of the same, and also citing them to appear and answer herein. Further ordered that public notice of the issuance of said monition be given by publication in the daily newspaper, "Humboldt Times," published in Eureka, county of Humboldt, once a week until the return date fixed in said monition. Further ordered that public notice of the issuance of

said monition be given in said cause by the posting of copies of said monition in three public places in the city of Eureka, county of Humboldt, California, and that service of said monition be made upon Eliza A. Early, claimant, by serving a copy thereof upon Eliza A. Early, at Eureka, State of California.
[29]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of **COGGESHALL
LAUNCH COMPANY**, a Corporation, and
HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel
“**ANTELOPE**,” for Limitation of Liability.

Order for Issuance of Monition.

It appearing to this Court that Coggeshall Launch Company, a corporation, and Hammond Lumber Company, a corporation, petitioners herein, filed in this court on the 19th day of March, 1915, their petition for limitation of liability; and

It further appearing that due appraisement under oath of this court has been made by the Honorable Francis Krull, appraising the value of the interests of said petitioners in the steam vessel “Antelope,” its boilers, engines, boats, tackle, apparel, furniture, and appurtenances, in the sum of Eight Thousand Dollars (\$8,000), and its freight pending in the sum of Five Dollars (\$5), at the close of its

voyage mentioned in the petition on file herein; and

It further appearing that the report of said Commissioner was filed in this court on the 27th day of April, 1915, and was thereafter approved by this Court on the 5th day of May, 1915; and

It further appearing that stipulations duly approved by this Court have been filed herein on the 24th day of June, 1915, conditioned that the petitioners herein will pay into this court, whenever the same may be ordered, either by this court or by the Appellate Court, in the event that an appeal intervenes, the aforesaid appraised value of the interests of said petitioners in said steam vessel "Antelope" and its freight pending, as the same were immediately after the closing of its voyage mentioned in said petition, together with interest thereon from the 15th day of [30] January, 1915; and

It further appearing that prayer is made in the petition herein for the issuance of a monition against Eliza A. Early, and all other persons claiming damages of said petitioners by reason of injuries to persons or to property occurring or arising upon the aforesaid voyage of the steam vessel "Antelope," or resulting from the loss upon the said voyage of the life of eGorge D. Early, citing them, and each of them, to appear before this court, and there make due proof of their respective claims.

And the court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED that a monition issue out of this court against all persons claiming damages by reason of

injuries to persons or to property occurring or arising upon that certain voyage of the steam vessel "Antelope," leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the 15th day of January, 1915, citing them to appear before the Honorable Francis Krull, United States Commissioner, and make due proof of their respective claims, at or before a certain date to be named in said writ, not less than three months from the issuing of the same, and also citing them to appear and answer in said cause; and be it

FURTHER ORDERED that public notice of the issuance of said monition be given by publication in the daily newspaper, "Humboldt Times," published in Eureka, county of Humboldt, once a week until the return date fixed in said monition, which shall be not less than three (3) months after the first publication thereof; and be it

FURTHER ORDERED that public notice of the issuance of said monition be also given in said cause by the posting of copies of said monition in three public places in the city of Eureka, county of Humboldt; and be it **[31]**

FURTHER ORDERED that service of said monition be made upon Eliza A. Early, claimant, by serving a copy thereof upon Eliza A. Early, city of Eureka, State of California.

Entered this 24th day of June, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 24, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[32]**

(Affidavit of Publication of Monition.)

(Printed copy of Monition is attached hereto on the original.)

State of California,
County of Humboldt,—ss.

Rose M. Spahr, being first duly sworn, deposes and says: That at all times hereinafter mentioned she was a citizen of the United States, over the age of eighteen years, and a resident of said county, and was at and during all said times the principal clerk of the printer and publisher of "The Humboldt Times," a newspaper of general circulation printed and published daily in the city of Eureka, in said county of Humboldt, State of California; that said daily "Humboldt Times" is and was at all times herein mentioned a newspaper of general circulation as that term is defined by Section 4460 of the Political Code, and, as provided by said section, is published for the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and is not devoted to the interests, or published for the entertainment and instruction of a particular class, profession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper has been established, printed and published in the said city of Eureka in said county and state at regular intervals for more than one year preceding the first publication of the notice herein

mentioned; that said notice was set in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpareil, describing and expressing in general terms, the purport and character of the notice to be given; that the Monition of which the annexed is a printed copy, was published and printed in said newspaper at least once a week for seven weeks, as follows: [33] July 1st, July 9th, July 16th, July 23d, July 30th, Aug. 6th, Aug. 13th, 1915.

ROSE M. SPAHR.

Subscribed and sworn to before me this 2d day of April, 1917.

[Seal] CHARLES H. DAVIS,
Notary Public in and for Humboldt County, California. [34]

*In the United States District Court, in and for the
Northern District of California, First Division.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY a
Corporation, Owners of the Steam Vessel
“ANTELOPE” for Limitation of Liability.

Return (on Service of Monition).

I HEREBY CERTIFY AND RETURN: That I was a Deputy United States Marshall in and for the Northern District of California, during all of the times herein mentioned; that as commanded by the Monition issued on the 28th day of June 1915, under order and seal of said Court I cited all cor-

porations and persons claiming damages for loss, damage or injury occurring and arising upon the voyage of the steam vessel "Antelope" leaving Samoa on Humboldt Bay, California, at six o'clock P. M., or thereabouts on the 15th day of January, 1915, to appear before the above-entitled court and make due proof of their respective claims before Hon. Francis Krull, a United States Commissioner at his office in the United States Court and Postoffice Building in the city and county of San Francisco, State of California, on or before the 15th day of October 1915 at 10:30 o'clock in the forenoon by giving public notice of said monition by posting certified copies thereof in three public places in the city of Eureka, county of Humboldt, State of California, to wit, one at a bulletin-board situated on the north side of Second Street between "G" and "H" Streets, one at the City Hall on the west side of "G" Street between Third and Fourth Streets and one at the courthouse at Fifth between "I" and "J" Streets and by causing a copy of said monition to be published once a week from the 1st day of July 1915 until the 13th day of [35] August 1915 in the "Humboldt Times," a newspaper of general circulation printed and published daily in the city of Eureka, county of Humboldt, State of California, as shown by the affidavit of the Times Publishing Company, printers and publishers of said newspapers, which affidavit of publication is hereby made a part of this return. I further certify that I particularly cited Eliza A. Early, claiming damages for the loss of life of George D. Early upon said voyage

of said steam vessel "Antelope" by handing a certified copy of said Monition to and leaving the same with said Eliza A. Early at her residence, to wit: No. 725 Tenth Street, in the city of Eureka, on the 30th day of June, 1915.

E. J. PURCELL.

United States of America,
Northern District of California,—ss.

E. J. Purcell, being first duly sworn, deposes and says: That he has read the foregoing return and knows the contents thereof; that he knows the same to be true of his own knowledge except as to the matters stated therein on information and belief and as to those matters he believes it to be true.

E. J. PURCELL.

Subscribed and sworn to before me this 5th day of April, 1917.

[Seal]

IRWIN T. QUINN,

United States Commissioner at Eureka, Northern
District of California. [36]

Publisher's Affidavit (as to Monition).

State of California,
County of Humboldt,—ss.

Before me, the undersigned, a notary public, this day personally came J. H. Crothers, who, being first duly sworn, according to law, says that he is the editor of "The Humboldt Times," a daily newspaper published at Eureka, in said county and state, and that the publication, of which the annexed is a true copy, was published in said paper on the first day of July, 1915, and once each week thereafter for

fifteen consecutive weeks and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

J. H. CROTHERS.

Subscribed and sworn to before me this 19th day of October, 1915.

[Seal]

ODEN E. FRIEND,
Notary Public in and for the County of Humboldt,
State of California.

(Printed publication for Monition attached hereto.) [37]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE” for a Limitation of Liability.

Monition.

The President of the United States of America to
the Marshal of the United States, in and for
the Northern District of California, GREET-
ING:

WHEREAS, a libel and petition were filed in the
District Court of the United States in and for the
Northern District of California, First Division, on
the 19th day of March, 1915, by the Coggeshall
Launch Company, a corporation, and Hammond

Lumber Company, a corporation, as the owners of the steam vessel "Antelope," praying for a limitation of their liability concerning the loss, damage or injury occasioned by the drowning of George D. Early, now deceased, while a passenger on the said steam vessel "Antelope," en route, on the 15th day of January, 1915, from the town of Samoa, county of Humboldt, State of California, to the city of Eureka, county of Humboldt, State of California, for the reasons and causes in said petition mentioned, and praying that a monition of the said court in that behalf be issued and that all persons claiming damages for the said death of George D. Early, now deceased, or for any other loss, damage or injury, may be thereby cited to appear before the said court and make due proof of their respective claims, and all proceedings being had, if it shall appear [38] that the said petitioners are not liable for any such loss, damage or injury, it may be so finally decreed by this court, and

WHEREAS, the value of the interest of said petitioners in the said steam vessel "Antelope," its boilers, engines, boats, tackle, apparel, furniture and appurtenances, has been appraised at the sum of Eight Thousand and Five (\$8,005) Dollars, and

WHEREAS, the above-entitled court has ordered that a monition issue against all persons claiming damages by reason of injuries to persons or property occurring or arising upon that certain voyage of the steam vessel "Antelope," leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the said 15th day of Jan-

uary, 1915, citing them to appear and make due proof of their respective claims, .

YOU ARE THEREFORE COMMANDED to cite all persons claiming damages by reason of injuries to persons or to property occurring or arising upon that certain voyage of the steam vessel "Antelope," leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the said 15th day of January, 1915, to appear before said court and to make due proof of their respective claims before the Hon. Francis Krull, a United States Commissioner, at his office in the United States Court and Postoffice Building, in the city and county of San Francisco, State of California, on or before the 15th day of October, 1915, at 10:30 o'clock in the forenoon, and

YOU ARE ALSO COMMANDED to cite such claimants to appear and answer the allegations of the petition herein on or before said [39] last-named date, or within such further time as the above-entitled court may grant, and to have and receive such further relief as may be due.

What you have done in the premises, do you then make return to this court, together with this writ.

WITNESS the Honorable M. T. DOOLING, Judge of the United States District Court in and for the Northern District of California, First Division, this 28th day of June, 1915, and of our Independence the year one hundred and forty.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed Apr. 9, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [40]

*In the United States District Court, in and for the
Northern District of California, First Division.*

No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE” for a Limitation of Liability.

Application for Restraining Order.

State of California,

City and County of San Francisco,—ss.

Nat Schmulowitz, being first duly sworn, deposes and says:

That he has been requested by Mr. Clarence Coonan, the attorney for the petitioners in the above-entitled proceeding, to make an application for a restraining order in the above-entitled matter.

Affiant is informed and believes and therefore alleges the fact to be that Eliza A. Early and her attorney are threatening to proceed with the prosecution of that certain action heretofore filed in the Superior Court of the State of California in and for the county of Humboldt, and numbered upon the records of said court as No. 7173, in which said action the said Eliza A. Early is the plaintiff, and the Coggeshall Launch Company and Hammond Lumber Company, defendants.

WHEREFORE affiant prays that in accordance with the admiralty rules of the above-entitled court and in accordance with the statutes in such cases made and provided that an order be issued by the above-entitled court restraining the said Eliza A. Early and her attorney, W. Ernest Dickson, Esq., and any other [41] persons acting under authority or instructions from or through them, from further prosecuting the said action hereinabove referred to.

NAT SCHMULOWITZ.

Subscribed and sworn to before me this 28th day
of June, 1915.

[Seal] NETTIE HAMILTON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jun. 28, 1915. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.

[42]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 28th day of June, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable

WM. H. SAWTELLE, District Judge for the District of Arizona, designated to hold and holding this Court.

No. 15,794.

In the Matter of the Limitation of the Liability of the Stm. Vessel "ANTELOPE," etc.

(Minutes—Restraining Order.)

In this cause the Court ordered that until further order of this Court, each and every person, corporation, et al., having any damages against steam vessel "Antelope" or against the Coggeshall Launch Company, a corporation, et al., for any loss, damage or injury arising upon a certain voyage of the said vessel "Antelope," as is more fully set forth in the libel herein, be, and they are hereby, enjoined and restrained from beginning or prosecuting any suit or suits against the said vessel "Antelope" or against the said Coggeshall Launch Company, etc., and further ordered, after considering application therefor, that Eliza A. Early, her agents, etc., be, and they are hereby, enjoined and restrained from further prosecution of that certain action heretofore filed in the Superior Court of the State of California in and for the County of Humboldt, and numbered upon the records of said court as No. 7173, in which said action the said Eliza A. Early is the plaintiff and the Coggeshall Launch Company and Hammond Lumber Company, defendants, wherein recovery is sought for damages by reason of the death of one George D. Early. [43]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel
“ANTELOPE,” for a Limitation of Liability.

Restraining Order.

It appearing to this Court that the Coggeshall Launch Company, a corporation, and the Hammond Lumber Company, a corporation, owners of the steam vessel “Antelope” petitioners herein, filed in this court on the 19th day of March, 1915, their petition for limitation of liability.

And it further appearing that due appraisement under the order of this Court has been made by the Honorable Francis Krull, appraising the value of the interests of said petitioners in the steam vessel “Antelope,” its boilers, engines, boats, tackle, apparel, furniture and appurtenances, in the sum of Eight Thousand (\$8,000) Dollars, and its freight pending in the sum of Five (\$5.00) Dollars, at the close of its voyage mentioned in the petition on file herein.

And it further appearing that the report of said Commissioner was filed in the above-entitled court on the 27th day of April, 1915, and was thereafter approved by this Court on the 5th day of May, 1915,

And it further appearing that there was filed with this court by the petitioners herein on the 24th day [44] of June, 1915, a stipulation with the petitioners herein as principals and the Fidelity and Deposit Company of Maryland as surety, approved by the above-entitled court, wherein it is conditioned that the petitioners herein will pay into this court whenever the same may be ordered either by this Court or by an appellate court, in the event that an appeal intervenes, the aforesaid appraised value of the interests of said petitioners in the said steam vessel "Antelope," its boilers, engines, boats, tackle, apparel, furniture and appurtenances, to wit, the sum of Eight Thousand and Five (\$8,005) Dollars, together with interest thereon from the 15th day of January, 1915,

And it further appearing from the petition on file herein that Eliza A. Early of the city of Eureka, county of Humboldt, State of California, has heretofore commenced and is maintaining an action against the petitioners herein, in the Superior Court of the State of California, in and for the county of Humboldt, wherein a recovery of damages is sought by reason of alleged injuries to one George D. Early, now deceased, occurring or arising upon that certain voyage of the said steam vessel "Antelope," leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the 15th day of January, 1915.

And it further appearing that prayer is made in said petition for an order restraining the said Eliza A. Early, her agents, representatives and attorneys

from further prosecuting the aforesaid action, as well as all other persons from prosecuting any suits against the petitioners herein, or against the said steam vessel "Antelope" save [45] in this court, in respect to any injuries to persons or to property occurring or arising upon the said voyage of the steam vessel "Antelope" leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the 15th day of January, 1915, and the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that until the further order of this Court, each and every person or persons, corporation or corporations, having or claiming to have any demands against the said steam vessel "Antelope," or against the Coggeshall Launch Company, a corporation, and the Hammond Lumber Company, a corporation, or either of them, petitioners herein, for any loss, damage, or injury caused by or arising upon that certain voyage of the steam vessel "Antelope" leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the 15th day of January, 1915, as set forth in the petition herein, be, and they are hereby, enjoined and restrained from beginning, prosecuting or maintaining any suit or suits against the said steam vessel "Antelope," or against the said Coggeshall Launch Company and the Hammond Lumber Company, or either of them, petitioners herein, except in this proceeding, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Eliza A. Early, her agents, representatives and attorneys be, and each of them are hereby enjoined and restrained from further prosecuting in the Superior Court of the State of California, in and for the county of Humboldt, that [46] certain action heretofore commenced by the said Eliza A. Early against the said Coggeshall Launch Company, a corporation, and the Hammond Lumber Company, a corporation, petitioners herein, wherein recovery is sought for damages alleged to have been suffered by reason of injuries, and in particular by reason of the death of one George D. Early, now deceased, occurring or arising upon that certain voyage of the steam vessel "Antelope" leaving the port at the town of Samoa, State of California, at six o'clock P. M., or thereabouts, on the 15th day of January, 1915.

Entered this 28 day of June, 1915.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed Jun. 28, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [47]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY (a Corporation), and HAMMOND LUMBER COMPANY (a Corporation), Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

**Answer of Eliza A. Early to Petition for Limitation
of Liability.**

To the Hon. MAURICE T. DOOLING, Judge of the
United States District Court for the Northern
District of California, Sitting in Admiralty:

The answer of Eliza A. Early to the petition of
the Coggeshall Launch Company (a Corporation),
and the Hammond Lumber Company (a Corpora-
tion), for limitation of liability, respectfully denies,
admits and alleges, as follows:

I.

Admits the allegations of Article I of said peti-
tion.

II.

Admits the allegations of Article II of said peti-
tion.

III.

Admits the allegations of Article III of said peti-
tion.

IV.

Admits the allegations of Article IV of said peti-
tion.

V.

As to the allegations in Article V of said petition,
alleging that the operation of the steam vessel
“Antelope” was without participation of any char-
acter by the Hammond Lumber [48] Company,
and that on the 15th day of January, 1915, said
steamer “Antelope” departed from Samoa to
Eureka in accordance with a regular schedule, this
claimant has no knowledge, wherefore she calls for

proof of all of said allegations, if the same be pertinent.

Referring to the allegations in Article V, relative to a doorway on the lower deck of said steamer "Antelope," denies that when said doorway is not being used for the purpose of loading or discharging freight, it is, and was closed by a heavy sliding door, but in that behalf avers that said door ought at such times to have been closed for the protection of passengers but as a matter of fact up to the 15th day of January, 1915, and for a long time prior thereto, it was the fixed habit and custom of the petitioners herein to carelessly and negligently permit said door to remain open, and being so open when said vessel was on her voyage there was nothing to prevent passengers from falling through said open doorway into the waters of Humboldt Bay, unless as was their fixed custom, petitioners placed across said doorway a heavy bar. That it was the custom of petitioners to place said bar across said doorway whether the door was open or closed, and because of the fact that said bar was usually in place and said door was usually open while said steamer was on her voyage, the regular passengers came to rely upon said bar as their protection from falling into the waters of Humboldt Bay.

Denies that on the voyage above mentioned said doorway was closed by drawing the sliding door to; denies that said George D. Early, either by himself or in company with others or at all shoved back said door; denies that on the occasion of this particular voyage the bar above referred to was not in place

because said door was closed, but in that behalf avers that said bar was left down and said open doorway was left unprotected solely because of the negligence and carelessness and unlawful conduct [49] of petitioners and their employees, and further avers:

That petitioners are common carriers and as such are engaged in the business of transporting passengers for hire by boat between Samoa and Eureka on Humboldt Bay and operates in said business the steam vessel or ferry known as the "Antelope";

That on the 15th day of January, 1915, while a regular passenger on said "Antelope," with his fare for his passage paid thereon, and while said steamer was engaged in making one of its regular trips, said George D. Early fell from said steamer "Antelope" and was drowned in the waters of Humboldt Bay; that said drowning was caused by the negligence of petitioners in that they failed, refused and neglected to place a bar or other safeguard across the said open doorway above referred to, and that on this voyage on which said accident occurred petitioners were running and operating said ferry-boat with an insufficient crew, being one man short of the number required by the rules and regulations provided by the United States authorities; that the employee whose duty and custom it had always been to place said bar as a protection across said open doorway was not on said boat at this particular time and no one had been employed to fill his place;

That George D. Early had been for a long time prior to the 15th day of January, 1915, regular passenger on said boat going daily to and from his

work at Samoa to his home in Eureka, and had always been accustomed to see the aforementioned bar across said open doorway and relied upon its being in place for his protection; that on the evening of January 15th, 1915, on the voyage mentioned by petitioners, petitioners carelessly, negligently and unlawfully failed and neglected to place or have placed said bar in its accustomed position; and said George D. Early, deceased, relying upon its being there as usual, and relying upon the duty of petitioners as common carriers to place either said bar in its proper position or other proper protection, and by reason and because of there being [50] no proper protection for passengers, and not because of his own negligence, said George D. Early fell through said open doorway into the waters of Humboldt Bay and was drowned.

VI.

Admits the allegations of Article VI.

VII.

Admits the allegations of Article VII relative to the business, condition and location of said steamer "Antelope" but denies that said vessel was properly manned, or properly officered or properly equipped for the business in which it was engaged or for the voyage on which said accident occurred, but in that behalf avers: Relative to incompetency of captain, insufficient equipment boat, etc., one man short.

VIII.

Denies that the drowning of George D. Early done, occasioned and incurred on said voyage of said steam vessel "Antelope" was done, occasioned and in-

curring without the consent or privity or knowledge or design or neglect of the petitioners or either of them, or of their or either of their directors, officers or servants, or of the said steamer "Antelope," but in that behalf avers that said drowning of the said George D. Early was occasioned by the neglect of petitioners herein, and their officers, servants and employees.

IX.

That on or about the 3d day of February, 1915, in the Superior Court of the State of California in and for the county of Humboldt, Eliza A. Early, mother of said George D. Early, commenced an action against the petitioners herein, for the loss of the life of said George D. Early, and on the 23 day of June, 1915, an amended complaint was filed in said action wherein and whereby the sum of \$7,500 was sought to be recovered in said action. That said amount is less than the value of the said steamer "Antelope," and that said cause is in all respects the same as that [51] set forth in the claim of this claimant on file herein: That said claim is the only claim filed in this proceeding.

That said action commenced in said State court is an action commenced under the provisions of a special statute, to wit: Section 376 of the Code of Civil Procedure of the State of California.

X.

That petitioners are not entitled to have the liability of them or either of them limited:

WHEREFORE YOUR CLAIMANT PRAYS, that petitioners take nothing by its petition on file

herein, and that the same be dismissed, and that claimant be permitted to pursue her said suit in the Superior Court of California; AND FURTHER PRAYS that in the event this Court holds that it has jurisdiction of the said petition for limitation of liability, that it deny the said limitation; and claimant further prays for her costs herein, and for such other relief as to the Court may seem meet in the premises.

GILLETTE & CUTLER, and
W. ERNEST DICKSON,
Proctors for Claimant.

United States of America,
State of California,
County of Humboldt,—ss.

Eliza A. Early, being first duly sworn, deposes and says:

That she is the claimant above mentioned. That she has read the foregoing answer and knows the contents thereof, and that the allegations of the same are and each thereof is to the best of her knowledge, information and belief true, as stated therein and there set forth.

ELIZA A. EARLY.

Subscribed and sworn to before me this 24th day of June, 1915.

[Seal] W. ERNEST DICKSON,
Notary Public in and for the County of Humboldt,
State of California. [52]

Receipt of the within Answer is hereby admitted this 16th day of July, 1915.

CLARENCE COONAN,
Proctor for Petitioners.

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

(Order Denying Motion to Dissolve Restraining Order.)

CLARENCE COONAN, Esq., Proctor for Petitioners.

W. ERNEST DICKSON, Esq., and GILLETT & CUTLER, Proctors for Eliza A. Early, etc.

On March 19th, 1915, the owners of the steam vessel "Antelope" filed in this court their petition for limitation of liability for loss or damage occurring upon a voyage of said vessel which began at the town of Samoa on Humboldt Bay on January 15th, 1915, and particularly for limitation of liability for the death of one George D. Early, a passenger, who upon said voyage fell into the waters of Humboldt Bay and was drowned. The petition sets forth the necessary statutory averments as to the equipment and seaworthiness of the vessel and that all loss and damage occurred without the privity or knowledge

of the owners. It further avers that on February 3d, 1915, an action was commenced in the Superior Court of the county of Humboldt against the petitioners for damages in the sum of \$50,000 for the death of said George D. Early, and that the total [54] value of the vessel and freight pending would not exceed \$14,000. Upon appraisement duly had in this court the value of the vessel and freight pending was found to be \$8,005, and on June 24th, 1915, a stipulation was given for the amount thereof. On the same day a monition was duly issued, and an order made restraining the further prosecution of the action in the State court. On July 19th, 1915, an answer to the petition was filed by Eliza A. Early, mother of the deceased George D. Early, and the plaintiff in the action in the State court, which answer avers that on June 23d, 1915, an amended complaint was filed in the Superior Court of Humboldt County in the action then pending, and that the amount of damages claimed in the amended complaint for the death of George D. Early was \$7,500. A motion was thereafter made in this court for an order dissolving the restraining order theretofore made, on the ground that as there was but one claimant, and as the amount of the claim (\$7,500), was less than the appraised value of the vessel (\$8,005), there was no occasion for any further restraint in the prosecution of the action in the State court. In support of this motion the case of the "Dauntless," 212 Fed. 455, is cited. In that case this Court said: "The statute providing for limitation of liability is designed for the protection of the ship-owner, and

the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there are more claimants than one. Where there is but one claimant, however, and his claim is for much less than [55] the amount to which the liability of the ship-owner may be properly limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants."

To these views I still adhere. But in that case the Court was speaking of conditions as they existed at the time of the filing of the petition for limitation of liability. There was no claim made at any time for an amount in excess of the value of the tugs therein involved. In the present case the action in the State court was for over six times the value of the vessel, and it was only when such value had been fixed at \$8,005 by appraisement in this court, that claimant reduced the amount claimed by her in the State court to less than this value. This reduction was made, in my opinion, solely for the purpose of ousting this Court of jurisdiction. This may not be done. When the Court has properly acquired jurisdiction based upon facts existing at the time of the filing of the petition for liability, the petitioners are entitled to have tried here both the question as to the extent of their liability and the question as to whether they are liable at all. The jurisdiction of the Court to try the latter question cannot be disturbed by a reduction of the amount claimed, so long

as any amount whatever is claimed. The motion to dissolve the restraining order will therefore be denied.

November 19th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Nov. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [56]

At a Special Session of a stated term of the District Court of the United States of America, for the Northern District of California, to wit, the March, 1916, term thereof, held at the courtroom of said Court, in the United States Postoffice and Courthouse Building, in the city of Eureka, county of Humboldt, State of California, on Thursday, the 6th day of July, 1916, at 10 o'clock A. M., held pursuant to statute and order of Court, heretofore entered upon the Minutes thereof at San Francisco, on July 1st, 1916. Present: MAURICE T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition to Limit the Liability of the Owners of the Steam Vessel "ANTE-LOPE," etc.

(Minutes of Trial.)

This cause came on regularly this day for hearing of the issues herein. Clarence Coonan, Esq., was present as proctor for and on behalf of petitioners.

W. Ernest Dickson, Esq., was present as proctor for and on behalf of claimants. Proctors for respective parties then made statements as to the nature of this cause. Mr. Coonan then called Walter Coggeshall and G. W. Fenwick, each of whom were duly sworn on behalf of petitioners and examined, and introduced in evidence certain exhibit, which was filed and marked Petitioners' Exhibit One (Complaint Superior Court, etc.). Mr. Dickson then called Eliza A. Early, William Early, James P. Foley, Alva Moss, Joseph H. Whelihan, Otto Johnson, Emmet Whelihan and Frank H. Wilkinson, each of whom was duly sworn on behalf of claimants and examined, and introduced in evidence certain exhibits, on behalf of said claimants, which were filed and marked Claimants' Exhibits "A" (Certificate of Inspection), and "B" (tickets).

Thereupon, the hour of adjournment having arrived, the Court ordered that the further hearing of this cause, be, and the same is hereby continued until Friday, July 7th, 1916, at 10 o'clock A. M.

[57]

At a Special Session of a stated term of the District Court of the United States of America, for the Northern District of California, to wit, the March, 1916, term thereof, held at the courtroom of said court, in the United States Post-office and Courthouse Building, in the city of Eureka, county of Humboldt, State of California, on Friday, the 7th day of July, 1916, at 10

o'clock A. M., held pursuant to statute and order of Court, heretofore entered upon the Minutes thereof at San Francisco, on July 1st, 1916. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition to Limit the Liability of the Owners of the Steam Vessel "ANTELOPE," etc.

(Minutes of Trial.)

The hearing of the issues herein was this day resumed. Clarence Coonan, Esq., was present as proctor for and on behalf of petitioners. W. Ernest Dickson, Esq., was present as proctor for and on behalf of claimants. Mr. Coonan called James Mason, E. J. Weber, Nick Mustur, John R. Jacobson, Charles H. Smith, Bernard Kelly and Andrew Knudsen, each of whom were duly sworn on behalf of petitioners and examined, and recalled Walter Coggeshall, who was further examined, and thereupon rested cause on behalf of petitioners. Mr. Dickson recalled William Early, Joseph H. Whelihan, Emmet Whelihan and Alva Moss, who was further examined on behalf of claimants, in rebuttal. After hearing proctors for respective parties, the Court ordered that this cause be submitted on briefs to be filed in twenty, thirty and ten days. [58]

*In the United States District Court for the Northern
District of California, First Division, Sitting at
Eureka, California.*

No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel "AN-
TELOPE," for Limitation of Liability.

(Testimony Taken in Open Court.)

Tuesday, July 6th, 1916.

COUNSEL APPEARING:

For the Petitioner: CLARENCE COONAN, Esq.,
and H. L. RICKS, Esq.

For the Claimant: W. ERNEST DICKSON, Esq.

Mr. COONAN.—If your Honor please, this is a petition for limitation of liability filed by the Coggeshall Launch Company and the Hammond Lumber Company, owners of the steam vessel "Antelope"; this matter has come up before your Honor already on motion to dissolve the restraining order. I do not know whether your Honor cares to have me read the pleadings at this time or not.

The COURT.—I have some recollection of the case, but not very clear.

Mr. COONAN.—I will read them. (Reads the petition.) Do you desire me to read the answer?

The COURT.—I have read the answer.

Mr. DICKSON.—I renew my objection to the

granting of the petition on the same grounds under the authority cited to your Honor heretofore when the motion was up before you to dissolve the restraining order, and we wish to renew our objection.

The COURT.—The objection is overruled.

[59]

Testimony of Walter Coggeshall, for Petitioners.

WALTER COGGESHALL, called for the petitioners, sworn.

Mr. COONAN.—Q. What is your name?

A. Walter Coggeshall.

Q. Have you any connection with the Coggeshall Launch Company, the petitioners in this case?

A. Yes, sir; I am its president and manager.

Q. Is the Coggeshall Launch Company a corporation? A. Yes, sir.

Q. On January 15, 1915, was the Coggeshall Launch Company the owner of the steam vessel "Antelope"? A. It was.

Q. Was it the sole owner of the steam vessel "Antelope"?

A. I bought the steamer "Antelope" on contract, on conditional payments, but we had possession of the ship and we considered that we were the owners.

Q. With whom did you have this contract?

A. With the Hammond Lumber Company.

Q. Under the terms of this contract did you enjoy the possession of this boat? A. Yes, sir.

Q. Did you operate this boat? A. Yes, sir.

Q. Did the Hammond Lumber Company take any part in the operation of this boat?

(Testimony of Walter Coggeshall.)

A. None at all.

Q. Did they have access to this boat whatsoever, except under the terms of that agreement.

A. None.

Q. You furnished the crew for this boat?

A. Yes, sir.

Q. And supplied the supplies when they were necessary? A. Yes, sir.

Q. Prior to the filing of this petition in the Admiralty Court was a claim made upon you by Eliza A. Early? A. Yes, sir.

Q. What was the subject matter of the claim?

A. A demand for \$50,000 to atone for the death of George D. Early.

Q. Is that a copy of the claim that was served upon you (showing)? A. Yes, sir; I think it is.
[60]

Q. In what form was the claim?

A. In the form of a summons.

Q. Was it not in the form of a complaint, the original of which has been filed in the Superior Court of the State of California? A. Yes, sir.

The COURT.—I suppose it was the usual form of a summons accompanied with a copy of the complaint?

A. Yes, it was, your Honor.

Mr. COONAN.—I would like to introduce this in evidence as “Petitioners’ Exhibit 1” as the form of claim that was served upon the petitioners herein.

Q. Captain Coggeshall, you have heard read to

(Testimony of Walter Coggeshall.)

you have you not, the answer to the claim of Eliza A. Early? A. Yes, sir.

Q. In that answer there is an allegation to the effect that upon the 15th day of January, 1915, in opposition and contrary to a custom upon the steamer "Antelope" a certain cargo door was left open and through this cargo door George D. Early fell into the waters of Humboldt Bay and was drowned. Now, if that cargo door was left open as alleged, did you have any knowledge of it on the 15th day of January, 1915? A. I did not; no, sir.

Q. It is also alleged in the answer that it was customary for the steamer "Antelope" to place a bar across this opening, when the door was open, and also it is alleged that upon this particular occasion the bar was not so placed, and because of the fact that it was not so placed George Early fell through the open door and into the waters of Humboldt Bay. As a matter of fact, if that bar was not placed in accordance with the ordinary custom, did you have any knowledge of that fact? A. No, sir.

Q. What is your position?

A. President and general manager of the company. [61]

Q. You look out for the operation of the boats that constitute the boats on that ferry system?

A. I do.

Q. Who was in control of that boat upon that day? A. Captain Krohnie.

Q. Did you tell Captain Krohnie the duties of supervising that boat?

(Testimony of Walter Coggeshall.)

A. I had made him master of the boat.

Q. Your own business has been connected with boats for quite awhile, hasn't it?

A. All my life, 15 years on Humboldt Bay, operating steamers, tow-boats and launches.

Q. You have been connected with the maritime matters for a long while? A. Yes, sir.

Q. How many years would you say?

A. Ever since I was a boy.

Q. From your knowledge of maritime matters, what were the duties of Captain Krohnie in regard to handling the steamer "Antelope"?

A. His duties were specifically laid down; he was master of the boat and had charge of the operation of that boat.

Q. And had control of the crew?

A. He hired the crew.

Q. He had control of the boat when it was on its daily trip? A. Yes, sir.

Q. It is also alleged in this answer that the steamer "Antelope" on that day was operating with one man short of a full equipment and because of the lack of this man, this bar was not put in place. Did you have any knowledge on the 15th day of July, that the steamer "Antelope" was operating one man short, if she was?

A. At that time I had no knowledge of that fact.

Cross-examination.

Mr. DICKSON.—Q. Are you acquainted with the deck-hand who had been employed on the "Ante-

(Testimony of Walter Coggeshall.)

lope'' by the name of Nick? A. Yes, sir.

Q. You knew that Nick for some time prior to the 15th of January had not been engaged in his usual place on that boat? [62]

A. I did not know it.

Q. You did not know that? A. No, sir.

Q. Did you not know that Nick was sick and in the hospital?

A. I did not know it until after the accident. By way of explanation, I would say that the crew was absolutely under the captain and I have little knowledge of the crew.

Q. You simply delegate that all to the captain?

A. He is master of the boat and hires his crew and fires them.

Q. You say that you did not know at that time that Nick was not at his post of duty? A. I did not.

Q. What is his other name?

A. Muster—M-u-s-t-e-r, I think it is spelled.

Q. How long had the "Antelope" been engaged in the business of carrying passengers across Humboldt Bay?

A. Ever since she was put in commission; I think it was four years prior to the accident that she was first put in commission.

Q. Had you been operating her for that length of time?

A. No, sir; I had been operating her since the 5th of July, 1911.

Q. Then from the 5th of July, 1911, up to and including the 15th of January, 1915, you were en-

(Testimony of Walter Coggeshall.)

gaged as a common carrier in transporting passengers between Samoa and Eureka, on the steamer "Antelope"? A. I was, yes, sir.

Q. The steamer "Antelope" was inspected each year? A. Yes, sir.

Q. Are you familiar with the certificate of inspection? A. I am.

Q. I will ask you to look at that (showing)?

A. I would judge that was a copy of her inspection certificate at that time.

Q. Did you note that there are two papers; just examine both of them?

A. It would appear to me that one was the inspection certificate of 1914, and one inspection certificate of 1915. [63]

Q. You keep copies of the certificate of inspection posted in public places on the boats?

A. Yes, sir; according to law.

Mr. DICKSON.—I will offer in evidence the certified copies of the certificates of inspection of the steamboat "Antelope" for the years 1914 and 1915.

(The certificates are marked Claimant's Exhibit "A.")

Mr. DICKSON.—Q. Where is Captain Krohnie now? A. I do not know, sir.

Q. When did you last know of him?

A. Well, I have simply heard that he was in San Francisco.

Q. Have you communicated with him since the happening of this accident?

(Testimony of Walter Coggeshall.)

A. Not since he left the ship except I heard he was in San Francisco.

Q. How long after the 15th of January, 1915, did he leave the ship?

A. I do not know that. I would have to look at our books to find out; it is a matter of record in the Custom-house when the next master was employed.

Q. It was a matter of a few days?

A. It was not a long time.

Q. It was not a long time? A. No, sir.

Q. It was less than a month?

A. Why, I would not want to make that statement; it was a short time after that when the present master, Captain Kelly, took the ship.

Q. Do you know whether or not the steamer "Antelope" was regularly enrolled in the office of the Collector of Customs?

A. Yes, sir; she has to be enrolled according to law.

Q. Was she enrolled there as belonging to the Hammond Lumber Company? A. Yes, sir.

Q. And she is still so enrolled, is she not?

A. At the present time, yes, sir.

Q. The oath of the president on file in the office of the Hammond Lumber Company, is on file, stating that she at that [64] time belonged and still belongs to the Hammond Lumber Company?

A. I assume it is on file; I never saw it.

Q. Did she as a matter of fact belong to the Hammond Lumber Company or to the Coggeshall Launch

(Testimony of Walter Coggeshall.)

Company, or to both of them?

A. She solely belongs to the Coggeshall Launch Company.

Q. How do you explain the fact that she is enrolled as being in the ownership of the Hammond Lumber Company?

A. From the fact that I bought that ship on contract on July 5, 1911. The contract was that I bought that ship along with two lighters. She was to be turned over to me and came into my possession. I was to operate that ship, and it was specified that I should pay the Hammond Lumber Company a certain amount of money on the first of July and on the first of January, these payments to continue until the 1st day of July, 1916. Then I to complete those payments, which I did, and paid the last payment on July 2d, 1916, of this present year; at the completion of those payments then the ship was to be deeded over to me. If I wanted to default in those payments then the payments up to the time that I may have defaulted were to be considered simply as rental of the ship; that is the customary way of buying a ship, what you may say, on time. I bought that ship on stipulated payments, six months apart. Then when those payments were made I would have complete ownership of that vessel.

Q. No deed had actually passed from the Hamond Lumber Company to yourself, or to the Coggeshall Launch Company prior to January 5, 1915?

A. No, there was no deed supposed to be passed until the present time. I would say that the ship

(Testimony of Walter Coggeshall.)

belonged to me just as long as I kept by those payments. I had possession of it from the day we made that deal on the 5th of July, 1911. From that moment she belonged to me. [65]

Q. She was engaged in transporting the workingmen from the Hammond Lumber Company at Samoa to Eureka?

A. That was a portion of her duties.

Q. It was the custom, the general custom of these men, to buy monthly tickets for transportation on the "Antelope," was it not? A. No, sir.

Q. Do you know whether or not George D. Early had such a ticket?

A. I do not know absolutely that he did; he must have had because he could not go aboard the ship unless he showed a ticket.

Q. From whom did the workingmen purchase those tickets.

A. From the Hammond Lumber Company; that is, at their office. They were delivered by them to the buyer.

Q. The Hammond Lumber Company delivered the books to the workingmen at their offices in Samoa, and the purchase money for those tickets was deducted from the regular monthly pay check by the Hammond Lumber Company?

A. I do not know anything about that, about whether it was deducted. I sent a certain number of books to the Hammond Lumber Company; we will assume 300 books every month; then we received

(Testimony of Walter Coggeshall.)

at the end of the month our pay for those books.

Q. Did the Hammond Lumber Company turn over to the Coggeshall Launch Company the full purchase price for all those books each month?

A. Yes, sir.

The COURT.—Q. They acted as your agents in selling the books?

A. They were our agents. Here are some 300 or 400 men traveling every month. The men might not have the purchase price of a book, and it would be impossible for us to collect our fare and not deal out those books. It was a slack way of doing business, so we appointed the Hammond Lumber Company as our agents. [66] As the pay of the men was coming from the Hammond Lumber Company, the Hammond Lumber Company looked out for our obligation.

Mr. DICKSON.—Q. Did the Coggeshall Launch Company maintain an office on the Eureka side of the bay? A. Yes, sir.

Q. Why is it that the Coggeshall Launch Company does not sell tickets in regular books and allow the men to purchase them here?

A. I would be very glad to collect the purchase price. If you were working over at Samoa and had no money, and came down and wanted transportation, why, their credit was not good, they might quit at any time and we would not get our pay.

Q. In other words, if you did have the money you could not get a ticket?

(Testimony of Walter Coggeshall.)

Mr. COONAN.—I object to this line of questioning. Captain Coggeshall made it clear that the Hammond Lumber Company acted as agent.

Mr. DICKSON.—I simply want to determine whether or not they were actually the agents, or the interest, or the amount of money which the Hammond Lumber Company received.

The WITNESS.—I made the statement that the Hammond Lumber Company were our agents.

The COURT.—I do not quite see what further light that gives us on this subject.

Mr. DICKSON.—I am trying to find out from this witness the relations existing between the Hammond Lumber Company and the Coggeshall Launch Company.

The COURT.—It really does not make much difference in this proceeding, if you hold anybody, you hold the ship.

Mr. DICKSON.—I want to determine the relationship if possible, between the two parties.

The COURT.—We have had that made fairly clear. He testified that he bought the boat on installments and while paying these installments [67] it was being run as a ferry between here and the Hammond Lumber Company establishment; that it transported workingmen back and forth, the exact number is not stated, and these books were purchased from the Hammond Lumber Company, as agents for the Coggeshall Launch Company, and that for the reason that it was more convenient for the Cogge-

(Testimony of Walter Coggeshall.)

shall Launch Company to get its money in this way, and more convenient for the workingmen to get these tickets this way.

Mr. DICKSON.—I do not care to go into it any further than that; that is a fact to bring out, that is all.

Testimony of G. W. Fenwick, for Petitioners.

G. W. FENWICK, called for the petitioners, sworn.

Mr. DICKSON.—Q. Have you any connection with the Hammond Lumber Company, one of the petitioners in this case? A. Yes, sir.

Q. What is your connection?

A. I am manager of its interest in this county.

Q. General manager in this county?

A. Yes, sir.

Q. Is the Hammond Lumber Company a corporation?

A. It is a corporation organized under the laws of the State of New Jersey.

Q. Mr. Fenwick, on the 15th day of January, 1915, did your company have any control over the steam vessel "Antelope"? A. None whatever.

Q. Do you know who had control of that vessel at that time?

A. Yes, sir; the Coggeshall Launch Company.

Q. Did your company have any interest in that vessel? A. No, no direct interest.

Q. Was this interest under an agreement with the Coggeshall Launch Company?

(Testimony of G. W. Fenwick.)

A. Yes, sir; an agreement for the purchase [68] of the steamer made in the early part of July, 1911.

Q. By the terms of that agreement the Coggeshall Launch Company was to have the entire control and operation of that vessel? A. Absolutely.

Q. Your company was not to interfere in the same? A. We assumed no interest.

Q. That was during January 15, 1915?

A. It was.

Q. What was the interest of your company, according to the terms of the contract?

A. Just the payment, that is all.

Q. It is alleged in the answer filed by the claimant herein that a certain cargo door was open on the steamer "Antelope" on the 15th day of January, 1915, and George D. Early fell through the open door into the water of Humboldt Bay and was drowned. Did you have any knowledge concerning that cargo door being open? A. None whatever.

Q. It is also alleged that it was the custom of the people operating that boat to maintain a bar across that opening when the door was left open, and on this occasion it is alleged the bar was not up; did you have any knowledge concerning the fact that that bar was not up on that occasion, if it was not up?

A. I did not.

Q. It is also alleged that that bar was not up because the steamer "Antelope" was operating one man short of her full crew, and that the man who had it among his duties to put up this bar, when the door

(Testimony of G. W. Fenwick.)

was open, was not on the boat. Did you have any knowledge that the steamer "Antelope" was operating upon that occasion one man short, if she was so operating? A. No, I did not.

Q. I will ask you to examine this instrument, which has been designated as "Petitioners' Exhibit No. 1," and ask you the question whether it is a copy of a complaint that was served [69] upon you, in which Eliza A. Early, claimant herein, is named as plaintiff?

A. Yes, sir, I am satisfied this is an exact copy of the complaint that was served upon me in the usual way, summons and complaint.

Q. In what sum was the prayer of that complaint?

A. That judgment be awarded in the sum of \$50,000.

Q. That was served upon you prior to the filing of this action in the admiralty court? A. Yes, sir.

Q. With reference to this contract that you have spoken of, and concerning the contract that Captain Coggeshall has also spoken of, was it the Hammond Lumber Company that was a party to that contract?

A. It was the Vance Lumber Company, a predecessor of the Hammond Company, a subsidiary lumber company, which has been consolidated since that time.

Q. Does the Hammond Lumber Company now control all the interests of the Vance Company?

A. Yes, sir.

Q. You say this contract is with the Vance Lumber Company?

(Testimony of G. W. Fenwick.)

A. The Vance Redwood Lumber Company.

Q. And the Hammond Lumber Company had no contract with the Coggeshall Launch Company relative to the ownership of the steamer "Antelope"?

A. The Vance Redwood Lumber Company had the contract. All interests of the Vance Redwood Lumber Company were afterwards taken over by the Hammond Lumber Company.

The COURT.—Q. Including the interest in the contract?

A. Yes, sir, including the interest in this contract, all of it.

Cross-examination.

Mr. DICKSON.—Q. Do you know whether or not the steamer "Antelope" was enrolled or registered in the office of the Collector of Customs at Eureka?

A. Why, I think so, yes.

Q. In whose name did she appear and stand of record? [70]

A. At that time in the name of the Vance Redwood Lumber Company.

Q. Do you know who appears as owner of record of the steamer "Antelope" on the 15th day of January, 1915?

A. I do not know. All I know is that the Vance Company was absorbed by the Hammond Lumber Company, some two or three years ago.

Mr. DICKSON.—That is all.

Mr. COONAN.—As I understand this proceeding, the burden of proof in regard to the claim for damages is upon the claimant, and consequently, as I

(Testimony of G. W. Fenwick.)

understand it, it will be necessary for him to produce his proof. If I am not correct in that assumption, I would like to be advised at this time. I will introduce my own witnesses. I have certain authorities on this question that I will be glad to submit to your Honor.

The COURT.—Do you mean as to the liability at all?

Mr. COONAN.—Yes.

The COURT.—Well, I am not quite clear on that.

Mr. COONAN.—It will only take me a minute to have the volumes of the Federal Reporter here, which I think will satisfy your Honor as to that conclusion.

Mr. DICKSON.—He may not come to that conclusion, and I am simply asking which of the contending parties should lead with the evidence, that is all.

The COURT.—You may proceed, Mr. Dickson.

Mr. DICKSON.—May it please the Court, do you desire me to read the answer, or will I make a statement?

The COURT.—You may state briefly what it is.

Mr. DICKSON.—We expect to prove that the Coggeshall Launch Company, in connection with the Hammond Lumber Company, were the owners of the steam vessel "Antelope," plying on Humboldt Bay, between Samoa and Eureka, and were such owners on January 15, 1915; that they were common carriers, engaged regularly in [71] the business of carrying passengers; that on that day one George

(Testimony of G. W. Fenwick.)

D. Early was a regular passenger, traveling with his ticket bought and prepaid, on the steamer "Antelope," between Samoa and Eureka, on the waters of Humboldt Bay. We expect to prove that on that voyage the steamer "Antelope" was operating in violation of the steamboat regulations, in that they had one man of their crew short. They are required to have two men, two deck-hands. At that time one of the deck-hands was sick in the hospital, and no other man had been hired or employed or furnished by them to take his place. That the man who was absent had always been accustomed, before leaving the port of Samoa, to place across an open door on the lower deck of the steamer "Antelope" a certain bar for the protection of the passengers. That on this particular voyage, on January 15, 1915, by reason of the man being away from his post of duty, the bar was not so placed on the voyage from Samoa to Eureka, and as they neared the Eureka side, Early, who was standing near the open door, across which the bar had usually been placed, fell into the waters of Humboldt Bay and was drowned. That no effort was made to save the man by any of the officers or crew of the ship after he had fallen into the water; that he remained on the surface of some little time. The steamer proceeded on her way without lowering the lifeboat, the small boat, and without giving any alarm by which launchmen in the vicinity could have saved the man. The "Antelope" proceeded on her way towards Eureka for about two city blocks; it would be approximately 600

(Testimony of G. W. Fenwick.)

feet before she finally stopped, and then all she did was to turn part way around and look into the vicinity where the accident occurred, and then proceeded on her way to Eureka. We expect to show that the accident was due entirely to the negligence of the officers and crew of the ship in failing to provide a bar for the safety of the passengers. We will [72] show, also, that there was a certain door which closed this same open passageway through which Early fell, and that the passengers themselves, had been in the habit continuously, for a number of years back, of opening and closing that door at will, without interruption or interference on the part of the officers or crew of the vessel. That on this particular voyage one of the passengers opened the door, in the first place; he closed the door before he left Samoa, and after proceeding on the voyage for some distance he opened the door, but there being no bar in its customary place, Early fell through the open doorway into the waters of the bay and was drowned. We are basing our action upon section 376 of the Code of Civil Procedure of the State of California. Section 376 is as follows:

“A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, any guardian for the injury or death of his ward, when such injury or death, is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death,

(Testimony of G. W. Fenwick.)

or if such person be employed by another person who is responsible for his conduct, also against such other person."

**Testimony of Mrs. Eliza A. Early, in Her Own
Behalf.**

Mrs. ELIZA A. EARLY, claimant, called in her own behalf, sworn.

Mr. COONAN.—I desire to object to each and every question which is asked by the claimant upon this cause of action upon the ground that each and every question is immaterial, irrelevant and incompetent; and any cross-examination that I may make of any witness is not to be considered as a waiver of that objection upon my part, or any witness that I might introduce. The only way I can safeguard my rights is by a general objection [73] of that character.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. Your name is Eliza A. Early? A. Yes, sir.

Q. You are the mother of George D. Early?

A. I am.

Q. George D. Early was drowned on the 15th day of January, 1915, was he not? A. He was.

Q. Now, has the father of George D. Early deserted his family? A. Yes.

Q. How many years ago? A. 12.

Q. And has not lived with his family since that time? A. He has not.

(Testimony of Mrs. Eliza A. Early.)

Q. And was not living with his family on the 15th day of January, 1915, and had not been for a long time prior thereto? A. No, sir.

Q. What was the age of George D. Early when he was drowned? A. 20 years and 25 days.

Q. At the time of the accident which caused his death where was George Early employed?

A. At Samoa.

Q. In the county of Humboldt, State of California? A. Yes, sir.

Q. With whom was he employed?

A. The Hammond Lumber Company.

Q. How long had he been employed there?

A. Well, he was almost five years; I think it would have been five years in July.

Q. During all of that time, did he reside in Eureka? A. He did.

Q. Did he go back and forward from Eureka to Samoa regularly every day to his work?

A. Yes, sir.

Q. By what means did he go to and from Eureka and Samoa? A. On the steamer "Antelope."

Q. Did he cross over to his work on each morning and come back on the steamer "Antelope" each evening? A. Yes, sir. [74]

Q. From whom did he purchase his ticket?

A. From the Hammond Lumber Company, at their office.

Q. Was it a daily ticket or monthly?

A. Monthly ticket.

Q. You know at the time of his death he had such

(Testimony of Mrs. Eliza A. Early.)

a ticket? A. Yes, sir.

Q. It was found on his person afterwards, was it not? A. Yes, sir.

Q. You say he was 20 years of age?

A. Yes, sir.

Q. What can you say as to the character of the boy? A. It could not be better.

Q. He was a boy of good, clean, moral habits?

A. He was.

Q. And worked regularly? A. Yes, sir.

Q. What was his physical condition?

A. Good, as far as I know.

Q. As far as you know he was in perfect physical condition? A. Perfect health.

Q. He had been prior to his death supporting you?

A. Partly; he and his brother.

Q. How much was he earning at the time of his death? A. \$2.25 a day, I think it was.

Q. \$2.25 a day? A. Yes, sir.

Q. He was working regularly, six days out of the week? A. He was.

Q. He had no physical deformity, or any illness of any kind or character? A. No, sir.

Mr. COONAN.—No cross-examination.

Testimony of William Early, for Claimant.

WILLIAM EARLY, called for the claimant, sworn.

Mr. DICKSON.—Q. Your name is William Early? A. Yes, sir.

Q. You are a brother of George D. Early?

A. Yes, sir.

(Testimony of William Early.)

Q. George Early was drowned on the steamer "Antelope" on the 15th day of January, 1915?

A. Yes, sir.

Q. He was at that time employed at the Hammond Lumber Company, [75] at Samoa, was he not?

A. Yes, sir.

Q. Prior to the time, had you also been employed at the Hammond Lumber Company? A. Yes, sir.

Q. It was your regular custom to go back and forth on the steamer "Antelope" with your brother to and from your work? A. Yes, sir.

Q. You lived at the same house he did at that time? A. Yes, sir.

Q. For how many years had you been traveling on the steamer "Antelope" back and forth with George Early? A. About three years.

Q. You are familiar with the operation of the steamer "Antelope"? A. Yes, sir.

Q. You had ridden on her night and morning?

A. Yes, sir.

Q. Practically every working day for three years?

A. Yes, sir.

Q. Do you remember clearly the time of the accident?

A. Well, I was not on the boat, but I remember when it was.

Q. On the lower deck of the steamer "Antelope" there is a large doorway, *through they* handle freight and through which passengers pass back and forward from the ship, is there not? A. Yes, sir.

Q. How far is that doorway, the bottom of the

(Testimony of William Early.)

doorway, above the water line?

A. About a foot and a half.

Q. It is down pretty near to the water?

A. About a foot, or a foot and a half.

Q. What width of rail is there between the open doorway and the outside of the ship?

A. About a foot.

Mr. COONAN.—Is that the ground rail you are referring to?

Mr. DICKSON.—The bottom of the floor.

Mr. COONAN.—The guard to the boat; that is known as the guard rail.

Mr. DICKSON.—Q. That strikes the wharf when they dock? A. Yes, sir.

Q. How wide is this doorway?

A. It is about seven or eight feet wide, I should judge. [76]

Q. It is a big, wide door? A. Yes, sir.

Q. What did the company who operated the boat put across that doorway so as to protect the passengers from falling out? A. They had a bar.

Q. How far from the floor was that bar, how high above the floor, when it was up?

A. About three feet.

Q. What was the custom of the deck-hands before leaving Samoa each night, relative to the placing of the bar and the closing of the door?

A. I do not know what the exact work was to be, but they were always supposed to put the bar up; they always had the bar up when I was there.

Q. That is, they put the bar up across the door-

(Testimony of William Early.)

way before leaving Samoa? A. Yes, sir.

Q. Was that done regularly every night?

A. Yes, sir.

Q. Whether the door was open or closed?

A. Yes, sir, I never see it done except when coming in.

Q. You have never known a time that that bar was not up after they had pulled away from the dock? A. No, sir.

Q. Who was it that placed that bar in position the last thing before leaving the Samoa side?

A. One of the deck-hands.

Q. Do you know his name?

A. Nick—Nick, is all I know.

Q. Nick? A. Yes, Nick.

Q. At the time this accident occurred, do you know whether or not Nick was on the boat, that is, whether he was at his post of duty?

Mr. COONAN.—I object to that.

Mr. DICKSON.—Q. I am asking what he knows, whether or not Nick was at his post of duty on the boat?

A. He was not there in the morning; I do not know anything about the evening.

Q. Do you know how long he had been away from his post of duty prior to that morning?

A. I do not know how long. [77]

Q. Do you know whether or not it had been for some days? A. Yes, it had been for some days.

Q. Do you know where he was?

A. No, I do not know where he was.

(Testimony of William Early.)

Q. Do you know whether or not any other man had come on there to take his place?

A. No, no other man.

Q. No other man? A. No.

The COURT.—Is there any dispute that this man was missing?

Mr. COONAN.—We concede that there was one man short upon that evening, one of the deck-hands.

Mr. DICKSON.—Q. Was the door to this open doorway, as a regular thing, closed or open on the voyage back and forth from Eureka to Samoa?

A. Well, both, I have seen both ways.

Q. You have seen it both ways? A. Yes, sir.

The COURT.—Q. Did it swing, or slide?

A. It was a sliding door.

Mr. DICKSON.—Q. Sometimes it was left open, and sometimes it was closed? A. Yes, sir.

Q. On this occasion, when the door happened to be closed, what was the custom of passengers riding on the lower deck, relative to opening that door before they arrived at Eureka?

A. Just before they got to the deck, when the whistle blew, they would open the door.

Q. Some of the passengers would open the door?

A. Yes, sir.

Q. Was that a regular habit? A. Yes, sir.

Q. And had been all the time that you had been traveling back and forth on the boat? A. Yes, sir.

Q. Was that habit known to the officers of the boat?

(Testimony of William Early.)

A. It certainly must have been; they could see us getting off.

Q. They could see them go out every night?

A. Yes, sir.

Q. Was any objection offered to it?

A. No, not to me.

Q. You rode regularly on the lower deck, near the door? A. Yes, sir. [78]

Q. If there had been any objection offered to that, you would have been in a position to hear it?

A. Yes, sir.

Cross-examination.

Mr. COONAN.—Q. You said that you traveled with your brother for three years crossing the bay?

A. Yes, sir.

Q. Did you usually travel on the lower deck?

A. Yes, sir, usually on the lower deck.

Q. You were thoroughly familiar with the system? A. Yes, sir.

Q. And so was your brother? A. Yes, sir.

Q. He was thoroughly familiar with it? He knew how that door opened, did he not? A. Yes, sir.

Q. You have said that you have seen that door open and the bar down, and that door closed and the bar up? A. Yes, sir.

Q. Do you mean to say that you never have seen that door open and the bar down? A. Yes, sir.

Q. You never heard a deck-hand give instructions to go out through that port door? A. No.

Q. And you have traveled there three years?

A. Yes, sir.

(Testimony of William Early.)

Q. What position did you usually take on that lower deck?

A. Near the side, right alongside of the boiler.

Q. Did you and your brother ever help open that door?

Mr. DICKSON.—That is objected to as irrelevant, incompetent and immaterial.

The WITNESS.—Yes, he did.

Mr. COONAN.—It was brought out that certain passengers did; I want to know if this specific passenger did.

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. Did your brother ever assist in opening that door? A. Yes, sir.

Q. How many times? A. I do not know. [79]

Q. How many times have you ever opened that door?

A. I don't know as to that; maybe two or three.

Q. Did you ever see a boy by the name of Wheilihan open that door? A. I don't remember.

Q. Did you ever see a boy by the name of Albert Moss open it? A. I don't remember.

Q. Do you remember seeing your brother?

A. Yes, sir.

Q. On quite a number of occasions?

A. Just three or four times.

Q. There may be other times, that you do not recollect? A. Certainly.

Mr. COONAN.—Is it necessary to note an exception in the Federal courts?

The COURT.—Yes.

(Testimony of William Early.)

Mr. COONAN.—I want to note an exception to the first ruling of your Honor.

The COURT.—You may have it.

Testimony of James T. Foley, for Claimant.

JAMES T. FOLEY, called for the claimant, sworn.

Mr. DICKSON.—Q. What is your name?

A. James T. Foley.

Q. At the present time you are acting Deputy Collector of Customs at Eureka? A. Yes, sir.

Q. You have charge of the official records of the Collector of Customs? A. Yes, sir.

Q. I will ask you whether or not you have a record of the steamer "Antelope" with you?

A. Yes, sir, I have the record of the enrollment.

Q. According to the enrollment, who was the owner of the steamer "Antelope" at the time the enrollment was made?

A. On the 29th day of November, 1913, the Hammond Lumber Company was the owner [80] of, and this document was issued for one year.

Q. That would take it up to November, 1914?

A. And it was renewed on the 29th day of November, 1914; and again renewed on the 29th day of November, 1915.

Q. Each time that renewal operated for one year?

A. Yes, sir.

Q. According to the records, from November, 1913, to November, 1915, the Hammond Lumber Company were the owners of the steamer "Antelope"? A. Yes, sir.

(Testimony of James T. Foley.)

Mr. DICKSON.—Does your Honor care to see this book?

The COURT.—These renewals are made on the application of the owners?

The WITNESS.—Yes, sir.

Mr. DICKSON.—It is a public record, and I wish to read a portion of this into the record. This is taken from the record of the Consolidated Certificate of Enrollment and License of the Custom-house record, Department of Commerce and Labor, Vol. 3, and I am reading from page 21:

“The United States of America,
Department of Commerce and Labor.

Bureau of Navigation.

Official No. 107,031.

Measured at Eureka, Cal., 1909, No. of Crew, 3.

Consolidated Certificate of Enrollment and License. (Sections 4319 and 4321 Revised Statutes.) And Act of April 24th, 1906. In conformity to title L ‘Regulations of Vessels in Domestic Commerce’ of the Revised Statutes of the United States, A. B. Hammond, of San Francisco, President, having taken and subscribed the oath required by law and having sworn that Hammond Lumber Company, Incorporated under the laws of the State of New Jersey and having its principal place of business at Jersey City, State of New Jersey, is the sole owner of the vessel called the ‘Antelope’ of Jersey City (home port New [81] York) and that the said vessel was built in the year 1909 at Samoa, California, of wood, as appears by permanent enrollment

(Testimony of James T. Foley.)

No. 6, issued at Eureka, Cal. (formerly District of Humboldt), on February 17, 1912, now surrendered because of change of district (formerly District of Humboldt) now consolidated with District of San Francisco, and said enrollment having certified that the said vessel is a stern-wheel steamer; that she has two decks, no mast, a sharp head, and a square stern, that her registered length is 100.6 feet; her registered breadth is 23 0/10 feet; her registered depth 5 0/10 feet,"—

Mr. DICKSON.—Evidently meaning that for feet. The word "feet" is scratched out.

(Reading:) "Capacity under tonnage deck 85 tons and 60 one hundredths. Capacity between decks above deck tonnage 75 05 one hundredths. Gross tonnage 160."

Mr. DICKSON.—After making the deductions,—the deductions are "Deductions under Section 4153 Revised Statutes as Amended by Act of March 2, 1895: Donkey engine and boiler 59.20. Total deductions 59.20. Net tonnage 101."

Mr. DICKSON.—Now, the form of renewal. I am reading from page 22. Renewal No. 1:

"Renewal No. 1 Port of Eureka, California.

"The within described License is hereby renewed for one year from November 29, 1914. Seal." And signed "M. Lipowitz, Deputy Collector of Customs."

Mr. DICKSON.—Renewal No. 2 is as follows:

(Testimony of James T. Foley.)

“Port of Eureka, California.

The within described License is hereby renewed for one year from November 29, 1915.

C. R. TEMBY,

Deputy Collector of Customs.” [82]

Mr. DICKSON.—Q. You have also with you, Mr. Foley, have you not, the oath of ownership of the steamer “Antelope”? A. Yes, sir.

Q. Will you kindly turn to that?

A. Yes, sir, I have it here.

Q. That is the registered oath that is found in the records of the Collector of Customs for the Port of Eureka? A. Yes, sir.

Q. What does that oath of ownership show as to the ownership of the steamer?

A. It shows that it is owned by the Hammond Lumber Company.

Q. Who takes and subscribes to that oath?

A. A. B. Hammond as president of the Hammond Lumber Company.

Q. What is the date on which that oath is taken and subscribed? A. 20th of November, 1913.

Q. Do you know of any other oath of ownership between the 20th day of November, 1913, and the 15th day of January, 1915, as to the steamer “Antelope”?

A. As I understand your question, there seems to be no other.

Q. There being no other or later oath of ownership what would you say as to the ownership, according to the records, on the 15th day of January,

(Testimony of James T. Foley.)

1915—that is, would that oath stand as a permanent record until changed?

A. So far as the record appears, that is a standing record; I do not know of any other on file, but in explanation of that statement I will say that I am only temporarily in charge of the office.

Q. There is no other oath of ownership of record?

A. It appears that there is no other oath in this book of records, and there is no later oath in this book.

Mr. DICKSON.—Do you wish to see these?

Mr. COONAN.—No. If you will tell me what your purpose is, perhaps we can concede it. [83]

Mr. DICKSON.—I want to read this into the record. It is a public record and I cannot introduce it in evidence. I am reading from the oath for enrollment and license of merchant vessel or yacht, from the record from the Custom-house, Department of Commerce and Labor, of the records of the Port of Eureka.

“Oath for Enrollment and License of Merchant Vessel or Yacht. Department of Commerce and Labor. Bureau of Navigation. Ownership oath. District of San Francisco. Oath of officer of incorporated company. Department of Commerce and Labor. I, A. B. Hammond, of San Francisco, President of Hammond Lumber Company, incorporated under the laws of the State of New Jersey, do swear according to the best of my knowledge and belief that the steamer called the ‘Antelope, at the Port of Eureka, California, in the District of San Francisco,

(Testimony of James T. Foley.)

is of the burden of 160 tons gross and 101 tons net. And was built in the year 1909 at Samoa, California, of wood, as appears by permanent enrollment No. 6 issued at the Port of Eureka, California, February 17, 1912.

I am a citizen of the United States and that the said steamer is owned by Hammond Lumber Company, incorporated under the laws of the State of New Jersey, having its principal place of business at Jersey City, State aforesaid, and that T. C. Krohnkie, the present master or commander of said vessel is also a citizen of the United States, having been naturalized in the State of California, 1899, in conformity with the several laws respecting naturalization.

(Signed) A. B. HAMMOND,
President of Hammond Lumber Company, San
Francisco." [84]

"Subscribed and sworn to before me this 20th day of November, 1913.

FRANK L. OLIVER,
Notary Public in and for the City and County of
San Francisco, State of California."

Mr. DICKSON.—That is all.

Mr. COONAN,—No questions.

Testimony of Alva Moss, for Claimant.

ALVA MOSS, called for the claimant, sworn.

Mr. DICKSON.—Q. Your name is Alva Moss?

A. Yes, sir.

Q. Where do you reside, Mr. Moss?

A. 820 Ninth Street.

(Testimony of Alva Moss.)

Q. In the city of Eureka? A. Yes, sir.

Q. Where are you employed?

A. In the Hammond Lumber Company.

Q. Working for the Hammond Lumber Company now? A. Yes, sir.

Q. Where were you employed on the 15th day of January, 1915?

A. With the Hammond Lumber Company.

Q. For how many years prior to this time had you been employed with the Hammond Lumber Company? A. About three years.

Q. About three years prior to this time?

A. Yes, sir.

Q. During those three years had you resided in Eureka? A. Yes, sir.

Q. It was your practice to cross Humboldt Bay to Samoa from Eureka, to go over each morning and return each night to Eureka? A. Yes, sir.

Q. Six days of the week? A. Yes, sir.

Q. How did you go to and from your work?

A. On the "Antelope."

Q. On the steamer "Antelope"? A. Yes, sir.

Q. What kind of a ticket did you have, daily or monthly? A. A monthly ticket.

Q. That was the same kind of a ticket that was issued to all workmen who rode back and forth from Eureka to Samoa? A. Yes, sir. [85]

Q. Did you know George D. Early?

A. Yes, sir.

Q. How long had you been acquainted with him?

A. Four or five years, anyway.

(Testimony of Alva Moss.)

Q. You had ridden backward and forward on that boat with him every day during the time that you had been in the employ of the Hammond Lumber Company, every work day? A. Yes, sir.

Q. You came to know him pretty well, didn't you?

A. Yes, sir.

Q. What kind of a boy was he as to his habits? Was he a good, moral, clean boy? A. Yes, sir.

Q. Addicted to drink in any way?

A. No, not that I know of.

Q. He went regularly at his work? A. Yes, sir.

Q. Was he physically sound, that is, was he always able to do his work, he had no defects or deformity of any kind? A. Yes, sir.

Q. Do you remember what happened on the evening of January 15, 1915, as the steamer "Antelope" was on her way from Samoa to Eureka?

A. I know a few things that happened.

Q. You have a pretty clear recollection of that night? A. Yes sir,

Q. You remember the fact that George Early fell from the boat and was drowned?

A. Yes, sir. I cannot say whether or not it was on that day.

The COURT.—Is there any question about it?

Mr. COONAN.—No. We will concede that the boy was there.

Mr. DICKSON.—Q. Do you know whether or not George Early had a ticket at that time the same as all the workmen had? A. He must have had.

Q. Mr. Early, before the boat left the Samoa side,

(Testimony of Alva Moss.)

was the large doorway leading to the lower deck of the "Antelope" open or closed? A. Open.

Q. It was open. A. Yes, sir. [86]

Q. That large door was open when you came aboard the "Antelope"? A. Yes, sir.

Q. Did you go on the upper deck or the lower deck?

A. On the upper deck first, then I went downstairs.

Q. And you found this large door open?

A. Yes, sir.

Q. What was the condition of the weather?

A. Clear. The wind was blowing quite a bit.

Q. What did you do with reference to that door?

A. I went over and closed it.

The COURT.—Q. Before you left the dock?

A. Yes, sir.

Mr. DICKSON.—Q. Was it the habit of the passengers to open and close that door at will?

A. Yes, sir.

Q. And without objection on the part of the officers or men of the boat?

A. They did not say anything about the door; we always opened and closed it.

Q. They never objected to your opening and closing that door? A. No, sir.

Q. On this occasion you say you closed the door?

A. Yes, sir.

Q. You remember the deck-hand that was usually employed on the steamer "Antelope" by the name of Nick? A. Yes, sir.

(Testimony of Alva Moss.)

Q. Was Nick there that night? A. No, sir.

Q. How long had he been off from that boat?

A. I don't know exactly.

Q. He had been off for a number of days, had he not? A. Yes, sir.

Q. Do you know whether or not he was sick and in the hospital? A. I heard he was.

Q. You just heard that,—you do not know that of your own knowledge? A. No, sir.

Q. Who was it that usually closed that door before leaving the Samoa side?

A. Nick, he used to come down and close it, most of the time. [87]

Q. Would he always put up the bar?

A. Yes, sir.

Q. He put the bar up and closed the door, before leaving the Samoa side, as a regular part of his duty? A. Yes, sir.

Q. Was the bar always put up, whether the door was open, or whether it was closed? A. Yes, sir.

Q. Where did you sit on the way from Samoa to Eureka? A. By the door.

Q. Right by the door? A. Yes, sir.

Q. Sat right beside it? A. Yes, sir.

Q. As you approached the Eureka side just tell the Court what happened.

A. Well, I shut the door and sat down by the side of it and when we got pretty near on this side I got up and started to open the door.

Q. You got up and started to open the door?

A. Yes, sir.

(Testimony of Alva Moss.)

Q. Did you have the door all the way open?

A. Not quite; it got stuck.

Q. About how far?

A. About one foot or 2 feet.

Q. About one foot or 2 feet from being entirely open? A. Yes, sir.

Q. No one objected to you doing that?

A. No, sir.

Q. Immediately afterwards did George Early fall into the water? A. Yes, sir.

Q. And was drowned? A. Yes, sir.

Q. You saw him fall in? A. Yes, sir.

Q. Do you know how he happened to fall?

A. No, sir.

Q. You saw him just as he was going into the water? A. Yes, sir.

Q. Did he sink immediately?

A. No, he floated a little while.

Q. Remained upon the surface of the water for sometime, did he? A. Yes, sir.

Q. What was done,—was there an alarm sounded immediately?

Mr. COONAN.—I object to any testimony on the point beyond where this boy fell into the water. It is alleged that the petitioners [88] acted negligently in law in allowing this door to be open, but there is no allegation to the effect that they did not conduct themselves properly after this boy fell into the water.

Mr. DICKSON.—I think your claims set that up.

The COURT.—Objection overruled.

(Testimony of Alva Moss.)

Mr. COONAN.—Exception.

Mr. DICKSON.—I will withdraw that last question.

Q. Were the officers of the boat immediately notified?

Mr. COONAN.—The same objection.

The COURT.—The same ruling.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. Were the officers immediately notified that he had fallen overboard?

A. I think they were.

Q. Some of the passengers immediately gave the outcry, and some ran and informed the engineers?

Mr. COONAN.—That question is objected to.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. You can just go ahead and state what was done as to the outcry that was raised and the notification that was given to the officers of the boat, immediately after his falling overboard.

Mr. COONAN.—The same objection on the same ground. I am going to make this objection to all this witness' testimony.

The COURT.—The general objection that it is not set up in the answer.

Mr. COONAN.—Yes.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

A. He went over—I says, “There goes George Early overboard,” and started back to get a life-preserver, and I got a life-preserver and threw it overboard; at that time he was quite a ways back of

(Testimony of Alva Moss.)

[89] the boat. I went upstairs; then I did not see him until after I got upstairs.

Q. Was any small boat lowered from the deck of the "Antelope"? A. No, sir.

Q. She had small boats hanging on the davits?

A. Two of them.

Q. I will ask you if any effort was made to lower a small boat? A. Not that I saw.

Q. Was any alarm whistle blown to attempt to make any rescue? A. Not that I know of.

Q. Just state in your own language what was done by the officers of the "Antelope" to attempt to help Mr. Early directly after he fell into the water.

A. Nothing, that I know of.

Q. How far did the "Antelope" proceed on her way before she stopped?

A. About a block or two, I guess.

Q. Then what was done with the steamer "Antelope," if anything?

A. She kind of swung around a little bit and then went back. I did not pay much attention to it.

Q. Were there other small craft near her in the bay?

A. The fellows said there were; I did not notice it myself.

Mr. COONAN.—I ask that that answer be stricken out as hearsay.

The COURT.—The first part of that may go out Mr. Dickson.

Mr. DICKSON.—Q. Going back to the opening of this door, Mr. Moss, it was your fixed custom to ride

(Testimony of Alva Moss.)

on that steamer "Antelope" right beside that door; that was your regular place, where you posted yourself during that trip?

A. Around that time, it was.

Q. You had seen that door opened on occasions by the passengers? A. Yes, sir.

Q. In fact, was it not a regular thing, as the "Antelope" neared the Eureka side, for some one of the passengers to open that door? A. Yes, sir.

Q. Had there ever been any objection offered to that practice by any of the officers or deck-hands of the steamer "Antelope"? [90]

A. Not to open the door? We used to open the door, nobody was down there to say anything about it.

Q. They never offered any objection to your opening that door? A. No, sir.

Q. That practice continued all the time that you were a passenger on that boat? A. Yes, sir.

Q. That was for quite a number of years?

A. Yes, sir.

Q. It was a regular fixed habit or custom for someone of the passengers to do that?

A. Yes, sir.

Q. As to the bar—was that bar always up?

A. Yes.

Q. And the passengers had come to rely upon that bar as no protection against falling into the water?

Mr. COONAN.—That is objected to as calling for the conclusion of the witness.

The COURT.—The objection is sustained.

(Testimony of Alva Moss.)

Mr. DICKSON.—Q. I will ask you whether or not it was the custom of George Early to ride right beside the door, right near you?

A. He was not very far from the door.

Q. There were a number of boys who were close friends and always rode together, sitting near that door? A. Yes, sir.

Q. Mr. Early had been accustomed to seeing that bar up there the same as you had?

Mr. COONAN.—That question is objected to as leading.

Mr. DICKSON.—Q. State what Mr. Early knew, as to his experience relative to that bar.

A. The same as the rest of us. He used to lean on the bar there before we got to the dock, and when we got to the dock we would take the bar off.

Mr. COONAN.—I object to that. That is not an answer to the question. I ask that the answer be stricken out.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. It had been the custom of the boys to stand [91] around this open door and lean upon this bar? A. Yes, sir.

Q. And the bar was not up the night George Early fell overboard? A. No, sir.

Q. Do you know whether anyone was there that night to fill the place of Nick, the deck-hand that was absent? A. Not that I know of.

Q. There was only one deck-hand on the boat that night? A. Yes, sir.

(Testimony of Alva Moss.)

The COURT.—That is conceded, I believe.

Mr. COONAN.—That is conceded.

Cross-examination.

Mr. COONAN.—Q. You said, if I understand you correctly, that the door was open when you left Samoa? A. Yes, sir.

Q. You opened the door; is that correct?

A. Yes, sir.

Q. Did anybody assist you to open that door?

A. To open the door?

The COURT.—He said he closed the door.

Mr. COONAN.—Q. After leaving Samoa you opened the door—is this a large door or a small door? A. It is a large door.

Q. Is it a door that you can handle by yourself?

A. I cannot open it alone.

Q. Did you upon this occasion have assistance?

A. Yes.

Q. Who assisted you? A. Early.

Q. Did the decedent Early assist you to open that?

A. He had a hold of the door when it was stuck.

Q. After the door became stuck he got up and lent a hand to you; is that correct? A. Yes, sir.

Q. You said that it was the habit of the passengers to open and close that door; is that correct?

A. Yes, sir.

Q. Was it the habit of the passengers also to insert the bar before they closed the door?

Mr. DICKSON.—Q. Upon the Samoa side, when proceeding to Eureka? A. Take out the bar.

(Testimony of Alva Moss.)

Q. Put in the bar?

A. Nobody ever touched the bar.

Mr. COONAN.—Q. When you said that every time that door was closed the bar was up, you did not state the truth, did you? A. Yes, sir.

Q. It was true, therefore, that every time that bar would be up, the door would be closed?

A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. Did Early know that?

A. He must have known it.

Q. You not only opened the door upon that occasion, but you opened it upon other occasions?

A. I used to help open it all the time.

Q. Did you ever see Early close that door?

A. No, sir.

Q. Did you ever see Early insert that bar?

A. No, sir.

Q. You yourself had inserted that bar?

A. No, sir.

Q. Do you know of any occasion when the door was closed and the bar was not up?

Mr. DICKSON.—If you don't understand the question—

The WITNESS.—I don't understand that question.

Mr. COONAN.—Q. You understand what I mean by that door being closed? A. Yes, sir.

Q. You understand what I mean by a bar being inserted on the outside of the door? A. Yes, sir.

Q. Have you known of occasions when that bar

(Testimony of Alva Moss.)

was out and the door was closed? A. No, sir.

Q. You do not? A. No, sir.

Q. Do you remember of having put the bar in yourself? A. No, sir.

Q. Do you remember of closing the door yourself? A. Yes, sir.

Q. Is it not a fact, then, that that door has been closed and the bar was up, and you knew it?

Mr. DICKSON.—I don't think that the witness understands what you mean. [93]

Mr. COONAN.—Q. Is it not a fact?

A. I don't remember. The bar was up there most of the time I have seen the bar; the bar was always up.

The COURT.—Was the bar on the outside of the door? A. Yes, sir.

Q. So that when the door was closed you could not tell from the inside whether the bar was up or not? A. No, sir.

Mr. COONAN.—Q. Do you remember the occasions when you closed that door and the bar was not up and you did not put the bar up?

A. Yes, sir.

Q. Did you ever see—were you ever on board her when they were taking freight in? A. Yes, sir.

Q. Was the bar up then? A. No, sir.

Q. Upon this occasion, the 15th day of January, did you come down there before any deck-hand had touched that door? A. Yes, sir.

Q. Did not that door have a bar upon that occasion? A. Yes, sir.

(Testimony of Alva Moss.)

Q. You closed that door? A. Yes, sir.

Q. Do you remember of other occasions when the bar was not outside and you closed the door?

A. Not that I remember of.

Q. Are you acquainted with me, Mr. Moss?

A. I don't know.

Q. Did you ever meet me? A. Yes, sir.

Q. Do you remember of an occasion upon which you met me? A. Yes, sir.

Q. Was that on or about the 14th day of February, 1916?

A. I cannot say just when it was.

Q. It was some time this last winter?

A. Yes, sir.

Q. Over at the Hammond lumber yards?

A. Yes, sir.

Q. Did you discuss this case with me at that time?

A. Yes, sir.

Q. Did you make the following statements to me—did you write this statement down? A. Yes, sir.

Q. Did I read the statement to you as I wrote them down? A. Yes. [94]

Q. Did you sign your name to the end of the statement as being correct as nearly as you could state? A. Yes, sir.

Q. Having traveled so often upon that boat for that length of time, you were aware of the nearness of the water to the outside of that door?

A. Yes, sir.

Q. Was Early aware of that fact?

Mr. DICKSON.—I object to that question; this

(Testimony of Alva Moss.)

witness could have no knowledge of what Mr. Early was aware of.

The COURT.—Objection sustained.

Mr. COONAN.—Q. Do you believe at this time that your recollection in February of this year was better than it is to-day?

A. I do not remember whether it is any better or not.

Q. It was closer to the time of the accident?

A. Yes, sir.

Q. Do you remember or not whether your recollection is better to-day?

A. I was not paying any attention to it at that time; I was not thinking anything about; I forgot all about it.

Q. Did you notice upon that occasion that the bar was not up when you closed the door?

A. Yes, sir.

Q. Do you know which hand Early used in opening that door, in assisting you to open that door?

Mr. DICKSON.—He does not say that.

Mr. COONAN.—He has said that after it was stuck, that Early assisted.

Mr. DICKSON.—Q. He assisted in opening the door?

Mr. COONAN.—Q. Did Early assist you, or did Early assist anybody in touching that door until it was entirely open?

A. He came over about the time it got stuck, and took hold of the door; he tried to shove it; I don't

(Testimony of Alva Moss.)

know whether it was full open or not.

Q. He took hold of the door, did he?

A. Yes, sir.

Q. Do you know which hand he used in pushing against that door? [95]

A. It must have been his right hand.

Q. Did you state to me on February 14th that you did not know whether he used his left hand or his right hand? A. Yes, sir.

Q. Did you step back when Early came to push upon the door? A. Yes, sir.

Q. Do you know what part of the door Early got hold of?

A. He must have got hold of the handle.

Q. Do you know what position Early fell back into the water in? A. He went over backwards.

Q. Did he make any motion with his arms?

A. His arms went up in the air, as he went back.

Q. Do you know of a time when the door was open and the bar was not up? A. No, sir.

Q. The bar was always up when the door was open: Is that correct? A. Yes, sir.

Q. I will hand you this paper (handing). Is that your signature? A. Yes, sir.

Q. Did you write that (indicating)?

A. Yes, sir.

Q. You signed that? A. Yes, sir.

Q. After I had read it to you? A. Yes, sir.

Q. Did you make this statement upon that occasion: "When the door was closed the bar was sometimes down. I remember that it was some-

(Testimony of Alva Moss.)

times down?" A. Yes, sir.

Q. Did you so testify to this court? A. Yes, sir.

Q. That you remember of no occasion upon which the bar was down and the door was closed?

A. It might have been down at some time.

Q. Then your statement made to me on the 14th day of February, 1916, that you did remember sometimes when the door was closed and the bar was down, is not correct? A. Yes, sir.

Mr. DICKSON.—I object to that on the ground that the statement is [96] not correct.

The COURT.—The objection is overruled.

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. Did Early ever assist you in opening the door prior to this occasion?

A. No, not that I know of.

Q. Did you make this statement to me: "I believe Early and I opened the door together before this time." A. He might have.

Q. You are not willing to say it is incorrect?

A. No, sir; every one of the boys opened that door.

Q. You stated to me: "I believe Early and I opened the door together before this time?"

A. Yes, sir.

Q. Do you now state that your statement upon that day was correct?

A. He must have helped me open it.

Q. Do you know that it was this man Nick's duty to close that door and put up the bar?

A. I don't know what his duty is.

(Testimony of Alva Moss.)

Q. Did you ever see the other deck-hand do that?

A. Not that I know of.

Q. You threw a life-preserver to Early?

A. Yes, sir.

Q. You made the statement upon your direct examination that no small boat was lowered, you did not see any effort made to lower a boat; upon which deck were you at the time immediately after the accident?

A. I was right outside on the lower deck.

Q. First, you went on the upper deck?

A. Yes, sir.

Q. Is that boat on the upper deck?

A. The lifeboat?

Q. Yes. A. Yes.

Q. Or the Texas deck, where the captain's cabin is? A. Yes, sir.

Q. Were you away up on top? A. Yes, sir.

Q. Were you able to see, in the position where you were, whether a boat was prepared to be lowered?

A. No, sir.

Q. So that you are not in a position to state whether any preparations were made to lower a lifeboat? A. I didn't see any. [97]

Q. That is the extent of your testimony?

A. Yes, sir.

Q. You made a statement to the effect that no effort was made to rescue Early after he fell overboard. Is it not a fact that the boat was stopped?

A. It stopped and went backward.

Q. Did it occur immediately after the accident?

(Testimony of Alva Moss.)

A. A short time after.

Q. How far would you say that the boat proceeded? A. About a block or two.

Q. Which one are you going to take?

A. I never paid any attention to it.

Q. You really do not feel that you can state the distance? A. It was a block at least.

Q. That is, 100 yards?

A. I don't know; a block.

Q. Then, did it go back to the place where Early fell overboard?

A. It went back a ways; I don't know as it went back as far as where he fell overboard.

Q. Did the boat stay there a while?

A. Yes, sir.

Q. Did you see anything of Early after you went back? A. No, sir.

Q. Did you go up to the upper deck before the boat began to back? A. Yes, sir.

Q. You did not see anything of Early after that time? A. No, sir.

Q. After the boat backed away as far as it backed, you did not see anything of Early? A. No.

Q. You did not know where he was?

A. No, sir.

Q. You could not see from the top of the water, there was not any of his clothing upon the top of the water? A. No, sir.

Q. In regard to the statement that no effort was made to rescue Early, I will ask you if you ever have been a seafaring man? A. No, sir.

(Testimony of Alva Moss.)

Q. Have you any knowledge of how to handle a boat? A. No, sir.

Q. Have you had any experience in handling a boat in the case of [98] an accident?

A. No, sir.

Mr. DICKSON.—All this line of examination is objectionable.

The COURT.—You asked him if any effort at all was made to rescue Early, and he said none that he saw. You can ascertain whether he would recognize an effort if he saw it.

Mr. COONAN.—Q. Do you feel that you are in a position to know whether an effort was made to rescue this man? A. I didn't see anything.

Q. You did not see anything done that you recognized as an effort? A. No, sir.

Q. You do not claim to be a sea-faring man?

A. No, sir.

Q. This is your first experience on board a boat in case of an accident? A. Yes, sir.

Q. Have you ever been instructed by the deckhands not to open that door? A. No, sir.

Q. You have never been instructed by the deckhands not to open that door? A. Not the door.

The COURT.—Q. Why do you say not the door?

A. Nobody said anything to us about opening and closing the door.

Q. What did they used to say to you?

A. They used to tell us to leave the bar alone.

Mr. COONAN.—Q. You said that they bid you at times to leave the bar alone? A. Yes, sir.

(Testimony of Alva Moss.)

Q. Did they have reference to that bar when it was lying on the deck of the ship, or when it was up, covering that opening?

A. They used to tell us not to take the bar out.

Q. Did they ever state that to you when the door was closed? A. I don't remember.

Q. Did they make that statement to you every time, or when the bar covered the opening, when the bar was covering that opening and the door was opened, shoved back, and the space would be [99] underneath, was it not upon those occasions that the deck-hand simply told you not to lean on the bar?

A. Yes, sir.

Q. They did not say that to you when the bar was down and the door closed? A. Not that I know of.

Q. Going back to this statement that you did not see any effort made to rescue this man: You did testify that the boat was stopped? A. Yes, sir.

Q. Do you recognize the stopping and backing of this boat as an effort to rescue the man?

A. Yes, sir.

Q. Then do you wish to change your statement that no effort was made? A. Yes, sir.

Redirect Examination.

Mr. DICKSON.—Q. Can you state, Mr. Moss, just about what position relative to the streets of Eureka that Mr. Early fell over; to explain that, the streets of Eureka run down to the waterfront perpendicularly to the line of the waterfront. This accident occurred opposite the foot of what street?

A. The Occidental Mill.

(Testimony of Alva Moss.)

Q. Was it right opposite the Occidental Mill?

A. It may have been up a little.

Q. B Street, if extended, would strike the water's edge just about where this accident occurred?

A. Yes, sir.

Q. That is true, is it not? A. Yes, sir.

Q. Is it not a fact that the "Antelope" was not stopped after the accident occurred until she got opposite the foot of D street?

A. A block after he fell over.

Q. Have you a clear recollection just what street the boat was opposite when she did stop?

A. No, sir.

Q. Then you do not know whether she went one block or two blocks? A. No, sir. [100]

The COURT.—I understand the testimony of this witness is that it was at least a block.

Mr. DICKSON.—Q. After he fell into the water you ran back to get a life-preserver? A. Yes, sir.

Q. And you threw it out to him? A. Yes, sir.

Q. How far was the boat away from Early when you threw the life-preserver; were you able to throw it clear to him? A. No, sir.

The COURT.—He said in his direct examination he was not able to throw the life-preserver to him.

Mr. DICKSON.—Q. Can you say about how far the boat was from him when you threw that to him?

A. Pretty near back to the end of the deck.

Q. That is back from the center way of the boat, back opposite the stern-wheel? A. Yes, sir.

Q. Then did you watch him from the lower deck

(Testimony of Alva Moss.)

after throwing the life-preserver? A. Yes, sir.

Q. He remained on the surface some little time, didn't he? A. Yes, sir.

Q. How far back could you see him, was he still in sight when you left the lower deck?

A. Yes, sir.

Q. He was still in sight? A. Yes, sir.

Q. Could you see him plainly, or rather dimly?

A. I seen him plainly.

Q. About how far back of the boat was he when you left the lower deck?

A. A little bit in back of the boat; he started to drift around in back of the boat; and then I went upstairs.

Q. Then you went around up the stairway onto the upper deck? A. Yes, sir.

Q. Did you try to see him from the upper deck?

A. Yes, sir.

Q. By the time you got up there you could not see him? A. No, sir.

Q. There was nothing in sight at that time?

A. No, sir. [101]

Q. How far had the boat gone then, from where the accident occurred, had it gone as far as a block?

A. I could not see George; he was not in sight; I did not pay any attention how far the boat had gone.

Q. Going back to this door, you say it was the custom for Nick, the deck-hand, to close the door and put up the bar before leaving the Samoa side?

A. Yes, sir.

Q. In summertime, or clear weather, was it the

(Testimony of Alva Moss.)

custom to have it open or closed?

A. They used to have it open.

Q. And on those occasions the bar was up?

A. Yes, sir.

Q. What can you say as a general rule on the voyage over as to having that door open or closed?

A. It used to be open. When the door was open the bar was there. We used to close the door when it was cold.

Q. You would close the door for your own protection? A. Yes, sir.

Q. It was your regular station each night, right by that door? A. Yes, sir.

Q. It was the regular custom of the passengers to open that door as you approached the Eureka side?

A. Yes, sir.

Q. When that door was open you were in a position to see whether the bar was up or down?

A. Yes, sir.

Q. On these occasions when the door was closed and you saw it opened as you neared the Eureka side, would the bar be in place? A. Yes, sir.

Q. When you first started to open the door on this particular night, you were alone, were you not, pulling on the door alone?

A. No, sir, I started to take hold of it alone.

Q. And pulled it back to the point where it stuck?

A. Another fellow was there, Whelihan.

Q. You and he opened the door to the point where it stuck? A. Yes, sir. [102]

Q. That was one foot or two feet from being en-

(Testimony of Alva Moss.)

tirely open? A. Yes, sir.

Q. When the door stuck, then it was that Early got up to give you a hand? A. Yes, sir.

Q. Do you know what it was that caused Early to fall into the water? A. No, sir.

Q. You did not see him until he had fallen, and had reached or nearly reached the water?

A. I see him when he struck, when he fell, when he left the boat.

Q. You saw him in the act of falling?

A. Yes, sir.

Recross-examination.

Mr. COONAN.—Q. You said that when you would open the door on arriving at the Eureka side you could always see the bar in place; is that correct? A. Yes, sir.

Q. You did not have any trouble in seeing whether it was there? A. No, sir.

Q. It is a big bar? A. Yes, sir.

Q. How wide is it horizontally?

A. Five or six inches.

Q. Upon this particular occasion, the light was sufficient, was it not, to see the bar if it was there?

A. Yes, sir.

Q. And you observed that it was not there when you opened the door? A. Yes, sir.

Mr. DICKSON.—Q. Had it become a fixed habit of a number of you boys, you and Early and Whelihan, to stand upon or lean up against that bar?

A. Yes, sir.

Q. That was your usual station, night after night,

(Testimony of Alva Moss.)

when you came across? A. Yes, sir.

Q. And no objection was offered to your doing that by the officers of the boat? A. No, sir.

Q. You just got into the habit of doing that?

A. Yes, sir.

Q. On most occasions that door would be open, and you simply used that as a smoking or lounging place? A. Yes, sir. [103]

Mr. COONAN.—Q. How far outside the door is the bar? A. About that far (indicating).

Mr. DICKSON.—How far is that?

A. Just so the door can close in front of it.

The COURT.—Q. An inch or two?

A. Yes, sir.

Mr. COONAN.—Q. When you shoved on that door, were you the inside man, were you the man that was nearest to the center of the ship, did you just shove on the inside of the door, or how did you do?

A. Right beside it. I just got hold of the door, and the door ran alongside of me.

Q. So that you were right this way (indicating)?

A. Yes, sir.

Q. You shoved on the inside? A. Yes, sir.

Q. Where did Early shove?

A. I don't remember where he shoved.

Q. Didn't you tell me on the 14th of February that he shoved from over your shoulder?

A. I might have; did I say he did?

Q. Anyway, he did not shove on the inside of the door? A. I don't know where he pushed.

Q. He was behind you?

(Testimony of Alva Moss.)

A. He did not come over at all until after the door got stuck.

Q. Did you notice the position that he took?

A. No, sir.

Q. Do you know whether or not he was directly behind you, or whether he was on the inside?

A. No, sir.

Mr. DICKSON.—Q. As to your observing him falling into the water, what was his position when he fell?

The COURT.—He said he fell backwards.

(A recess was here taken until two P. M.) [104]

AFTERNOON SESSION.

ALVA R. MOSS, recalled for further cross-examination.

Mr. COONAN.—Q. Do you know what the condition of the tide was this evening that Early lost his life? A. No, sir.

Q. You do not know whether it was high or low tide at that time? A. No, sir.

The COURT.—We have the tide tables; they will tell us that.

Mr. COONAN.—All right; I am going to bring it out from another witness.

Testimony of Joseph Whelihan, for Claimant.

JOSEPH WHELIHAN, called for the claimant, sworn.

Mr. DICKSON.—Q. What is your full name?

A. Joseph Whelihan.

Q. You reside in Eureka? A. Yes, sir.

(Testimony of Joseph Whelihan.)

Q. Where were you employed on the 15th day of January, 1915?

A. In the Hammond Lumber Company, at Samoa.

Q. How long prior to that time had you been working for the Hammond Lumber Company?

A. About five years.

Q. During those five years, did you make your residence in Eureka?

A. No, sir, I lived in Samoa for awhile.

Q. How many years prior to the 15th day of January did you make your residence in Eureka?

A. Three years.

Q. During those three years you crossed and re-crossed Humboldt Bay to and from your work on the steamer "Antelope"?

A. Yes, sir, on the steamer "Antelope."

Q. You had a regular monthly ticket?

A. Yes, sir.

Q. Was this the usual form of ticket that was issued?

A. That was the style for about two years, I should judge. They had a regular ticket, then they changed; then this has been going for about three years. [105]

Q. This style was in vogue at the time of the accident?

A. That style was in vogue at the time the accident occurred.

Mr. DICKSON.—I will offer this in evidence.

(The ticket is marked Claimant's Exhibit "B.")

Q. Were you a passenger on the steamer "Ante-

(Testimony of Joseph Whelihan.)

lope" on the evening of January 15, 1915?

A. Yes, I was.

Q. Where were you sitting on that evening?

A. About three feet from the door.

Q. That is, the door opening from the lower deck out to the water? A. Yes, on the lower deck.

Q. Were you acquainted with Mr. George Early?

A. Yes, sir.

Q. How long prior to the time of the accident had you known him?

A. About three years, I guess, somewhere around that.

Q. It was the regular custom, was it not, for you and Mr. Early and Mr. Moss and other of you young fellows that were friends, to sit around or near this door?

A. We always got close to the door, we were the first ones to open it, always.

Q. Was it the regular practice to open that door on approaching the Eureka side, if the door happened to be closed? A. Yes, sir.

Q. It was opened by some one of you boys?

A. By one of us fellows, yes, sir.

Q. Was any objection ever offered to that custom by the officers of the boat?

A. Nothing was said, nothing said about opening the door, whatever.

Q. And they had seen you open that door frequently?

A. They always seen us; we always did it.

Q. Before leaving the Samoa side, as a rule, was

(Testimony of Joseph Whelihan.)

that door closed or was it open? I am not talking about this particular night, I am talking about the general custom.

A. Sometimes the door was open; and there were times it was not, according to the way the weather was. [106]

Q. When the door was left open, did they have the bar in place? A. The bar was always in.

Q. The bar was always in?

A. Except that night of January, 1915; it was not in that night, that I know of.

Q. Who was it that fixed that bar in place, and closed the door, if it was closed?

A. Nick Muster, as a general rule, when he was there he always did it.

Q. He was one of the deck-hands?

A. Yes, sir, a deck-hand.

Q. There was only one other deck-hand beside Nick on the boat? A. Yes.

Q. If the door was closed on leaving the Samoa side, would Nick put up the bar in addition, whether the door was open or closed, was the bar up?

A. He always put it up; he always made it his duty to put it up.

Q. You remember the night of the accident, do you? A. I do.

Q. Tell the Court in your own language just what happened that night, can you? A. I can, yes.

Q. Just tell the court.

A. We had been talking about a trip to Indian Prairie the following day; it was Saturday, and we

(Testimony of Joseph Whelihan.)

figured on going up there. George spoke up and said he would like to go along with us fellows, so we kind of talked it up together, and we said we would go a short time afterwards; the whistle blew and my brother and myself opened the door, got it open within a foot and George, he goes up and he goes to help them. They got it open. Then he goes to lean back and he went out into the water. I watched him until he got past the boat, then I ran up.

Q. Was the bar up that night?

A. No, it was not.

Q. You mean leaned towards where the bar should have been?

A. Yes, sir; then he took the door like this here, and then he went over; I didn't see him again.

Q. He was facing the inside of the ship and with his back to the— [107]

A. (Intg.) With his back to the bar.

Q. Was Nick on the boat that night?

A. He was not on the boat; he was in the hospital.

Q. Had any man been employed to take his place?

A. I am pretty sure there was a young fellow about 22 or 23 years of age.

Q. He was not on the boat that night?

A. I cannot exactly swear to that, I am pretty sure the old fellow was taking Nick's place, and the young fellow took the old man's place.

Q. Do you remember whether or not the young man was there that night?

A. I am pretty certain that he was, although if he

(Testimony of Joseph Whelihan.)

was not, it was just a day or two afterwards that he was on.

The COURT.—Why do you go into this? It is conceded that he was not.

Mr. DICKSON.—Q. Was it not the custom of the boys to open that door if it happened to be closed, regularly, on the way over?

A. We always did it just about the time the whistle blew; it blew about opposite the Occidental Mill, so as the whistle blew us fellows would go up and open the door.

Q. Was there any objection to that?

A. They never said a word about opening the door; they gave us the dickens for taking out the block.

The COURT.—You mean the bar?

A. Yes, that bar that went on the outside.

Mr. DICKSON.—Q. When Early fell into the water, did he sink or float?

A. He went down to about here (indicating). The last I saw of him, he got in back of the boat and we could not see him.

Q. You could not, when he went in behind the stern wheel? A. Yes, sir.

Q. Then what did you do? A. I ran upstairs.

Q. Was he still in sight, when you got on the upper deck?

A. I could not see him at all; some of the fellows said they saw him. [108]

Q. You tried to see him? A. Yes, sir.

Q. But you could not see him? A. Yes, sir.

(Testimony of Joseph Whelihan.)

Q. Some of the other passengers tried to point him out to you? A. Yes, sir.

Q. How far did the ship go from the point where he tripped overboard, until she stopped?

Mr. COONAN.—That is objected to; there is nothing in the answer relative to negligence after the accident.

The COURT.—The objection is overruled.

Mr. COONAN.—Exception.

The WITNESS.—About two blocks; it was about B Street where he went in; he went in at B Street.

Q. That is, opposite B Street? A. Just about.

Q. A distance of about 600 feet? A. Yes, sir.

Q. Then when the “Antelope” stopped, what did she do?

A. She made about a half turn; then she drifted with the wind and tide; the tide was going; the wind was blowing kind of a northeast or nothwest corner, kind of back, and she drifted along.

Q. Was there any small boat lowered?

A. No small boats lowered then.

Q. Was any whistle blown by her?

A. If they blew, they were blown later; I could not hear them.

Q. If they had blown a whistle you would certain have heard it? A. I certain would.

Q. Was it the custom of the boys to lean up against and sit upon that bar on the way over?

A. We done it quite often.

Q. There was never any objection offered to that by the officers of the boat?

(Testimony of Joseph Whelihan.)

A. They never said anything; they gave us the dickens for getting under the bar, outside the boat.

Q. They had frequently seen you leaning and sitting upon the bar? A. Yes, sir. [109]

Mr. COONAN.—That is objected to as leading.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. I will ask you whether or not there were any officers, working men of the boat, near you on many occasions when you would be leaning against and sitting upon the bar?

A. They were always upstairs, as a general rule; except very seldom, when they were downstairs. The tide would have to be awfully low before they would come downstairs.

Q. They kept no watchman there by the door?

A. No, no watchman downstairs at all.

Q. As soon as George fell overboard was an outcry raised by the passengers? A. There was.

Q. The engineer's post of duty was right near where he fell?

A. Yes, sir, about as far as from here to right there (indicating); so the fellows yelled to him, then they grabbed up life preservers and threw them over. At that time I should judge they were about that close to him, from that chair to the lamp, there.

The COURT.—Q. Close to whom, to Early?

A. Yes, sir.

Mr. DICKSON.—Q. That was when they threw the first life-preserver?

A. Yes, sir. He had a bucket strapped to his arm, and he had his overcoat buttoned up.

(Testimony of Joseph Whelihan.)

Cross-examination.

Mr. COONAN.—Q. Were you and Early pals?

A. Just mere acquaintances, you might say.

Q. You were very friendly, were you not?

A. Just that way; just on the boat; I never was out with him.

Q. You traveled together on the boat, going across and returning? A. Yes, sir.

Q. Did you take trips together?

A. Only on the boat, going to and from Samoa.

Q. Did you ever make any trips out in the country? A. No, sir. [110]

Q. You planned to make some trips with him?

A. That was the first time; we planned going to Indian Prairie.

Q. You said that no objections were made to your opening the door.

A. Never; never any objections to opening the door.

Q. There were, however, objections made to your taking down the bar?

A. Before landing, yes, sir.

Q. Did you boys make a practice of taking down that bar?

Mr. DICKSON.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

A. We always took it down, when we landed.

Mr. COONAN.—Q. In spite of the objections that were made by the ship's officers, you did do that?

A. They never objected after landing; it was be-

(Testimony of Joseph Whelihan.)

fore landing that they objected.

Q. How far down the bay would you be; what distance would you be, when you would take this bar down?

A. They never took it down before they got within, I should judge, from me to Mr. Dickson from landing, when they took it down.

Q. What was the occasion for their objection?

A. I suppose they were afraid the fellows would fall overboard; I never asked them.

Q. They did make that objection that you speak of?

A. Yes, never take out the bar and stand on the outside of the boat; stand inside; they did not say where.

Q. They did say stay inside of the bar?

A. Yes, sir, that was the rule of the boat, to stay inside.

Q. To stay inside? A. Yes, sir, stay inside.

Q. Do you know of any reason why both the bar would be up and the door closed?

Mr. DICKSON.—That is objected to as calling for the conclusion of the witness. [111]

The COURT.—Yes, the objection is sustained.

Mr. COONAN.—Q. Did you say that you heard a whistle blow upon this occasion?

A. I heard no whistle blow at all.

Q. I mean, for the landing? A. Yes, sir.

Q. What position was the boat in at that time, how far down the bay?

A. She was about to D street when they blew the

(Testimony of Joseph Whelihan.)

whistle, a little bit before that; just a little before that, about G street it would be, about three blocks.

Q. Do you know what the condition of the tide was at that time? Q. She was going out.

Q. She was low?

A. Medium high, I judge; I did not pay any attention to the tide at that time, at all.

Q. How far did the boat proceed, after the accident occurred?

A. About two blocks, after he fell out of the boat, she went about two blocks.

Q. You would say she almost went to F street?

A. No, to G street.

Q. Did she go to G street before she stopped and backed? A. No, sir.

Q. She had gone beyond F street?

A. She went to F street—

Q. (Intg.) The accident occurred a little further down the bay, at B street?

A. At B street, is where the accident occurred.

Q. Then she proceeded as far as D street, before she backed?

A. Yes, sir, then they gave her a half turn; she came to a stop at D street, when she drifted with the tide; then she went all the way to where he went overboard.

Q. How long was she stopped there?

A. About 25 minutes, I should judge.

Q. How many minutes, would you say that it was after the accident occurred, that the "Antelope" came to a full stop?

(Testimony of Joseph Whelihan.)

A. I cannot tell you that exactly. [112]

Q. One minute?

A. More than that; three or four minutes, somewhere around there.

Q. Would you say as many as four minutes?

A. I cannot tell you the exact time; I never pulled a watch on it.

The COURT.—You cannot impeach the witness, if he says from B to D, and have him establish the time.

The WITNESS.—I cannot tell the exact time; the only way to tell that would be to look and see; I never looked at my watch to see.

Mr. COONAN.—Q. After you proceeded up the bay to the landing place, did you boys go out the lower deck that evening?

A. Yes, sir; we went out the lower deck.

Q. You did not go up onto the upper deck?

A. No, sir.

Q. Which way did the “Antelope” turn, after she had stopped, with her nose toward the north, or her nose toward Eureka?

A. The stern was facing toward the island, that would be kind of a northerly direction, her nose facing Eureka; just a half turn.

Q. Her nose was closer to Eureka then—

A. (Intg.) Her stern was pointing to Gunthers Island.

Q. In what condition was she when she backed?

A. She was drifting in that way.

Q. Did you see these boys open the door?

(Testimony of Joseph Whelihan.)

A. Yes, sir; I was standing almost within reaching distance of them.

Q. Was anybody handling the back of it at that time; was Early back of you?

A. My big brother and myself opened the door until we got it within a foot of open; then George gave a shove on the door, and they got it out; then he stepped back about a foot. Then he went to lean up against it, but there was no door there.

Q. Did he stay out upon the guard-rail?

A. No; just like he was leaning for that door, but the door was not there.

Mr. DICKSON.—I move to strike the answer out.

The COURT.—Objection overruled. [113]

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. Did you see him step out upon the guard-rail after the door was open?

A. It looked like he never got that far at all. It looked like he just went over backwards, expecting the door there, but it was not there.

Mr. COONAN.—I move to strike that answer out.

The COURT.—The motion is denied.

Mr. COONAN.—Exception.

Q. Did you see him looking toward the rear of the boat, on the outside of the boat?

A. He did not look that way.

Q. You testified, if I understand you correctly, that the bar was always up, whether the door was open or closed? A. Yes, sir.

Q. Did you ever close that door yourself?

A. No, sir, never myself.

(Testimony of Joseph Whelihan.)

Q. You have never seen that door closed, and opened it, and remarked upon the fact that the bar was not up?

A. No, sir; when the door was open or closed, the bar was always up, except January 15, 1915, it was not up at that time.

Q. When you said that you had lived in Eureka for three years, do you mean three years prior to January 15, 1915?

A. I was living in Eureka four years; four years the third of July, this month. It was from January to the third of July last year, I lacked a year at that time.

Q. You said that Nick Munster was the man who always placed the bar in when you saw it placed in?

A. Yes, sir.

Q. You had never seen the other deck-hand put that bar in?

A. Not that I know of; I never seen anybody else ever do it.

Q. Did you state that it was the manner and custom for you boys to lean up against that bar, to always sit upon it?

A. We never sat upon it; we would lean upon it kind of in this fashion. [114]

Q. You would lean over it, facing the water?

A. Yes, sir.

Q. Upon this evening could you see that the bar was not up?

A. I seen that it was not up. I did myself, but George never looked for it.

(Testimony of Joseph Whelihan.)

Q. Did you remark upon that fact to any person at that time? A. No, sir, I did not.

Mr. COONAN.—I move to strike out that part of his last answer, that George did not see it, as being voluntary upon the part of the witness.

The COURT.—Let it go out; the question was, did he see it. He said that George did not see it.

Mr. DICKSON.—Q. You say your brother and Moss had the door nearly open, that is, within one foot? A. Yes, sir.

Q. Before George got up?

A. George got up then and helped us; they opened it.

Q. He had been sitting on the back of the boat?

A. Yes, sir; he was sitting down.

Q. And then when he got up to offer assistance to them, his back was toward the water, and he was facing the front of the boat?

A. Yes, sir, his back was toward the water.

Q. In that position, he fell? A. Yes, sir.

Q. Did this guard-rail—how wide is it?

A. It is about so wide; it catches me right here, in the small of the back.

Q. You are speaking of the bar? A. Yes, sir.

Q. From the outside of the water's edge, there is a little, narrow ground-rail down on the level with the deck, right where his feet would come?

A. About that wide, I judge.

The COURT.—Q. A little over a foot?

A. About half a foot.

Mr. DICKSON.—Q. So that a person, in falling

(Testimony of Joseph Whelihan.)

through the doorway, would fall immediately into the water, without touching any guard-rail?

A. It is pretty sure he would fall in the water without [115] touching that rail at all.

Q. In other words, if he fell through the door, he would fall immediately into the water?

A. Yes, sir.

Q. After the accident happened, you heard no whistle blow? A. I heard no whistle blow.

Q. Did you see any steam launch at that time, near the "Antelope"?

A. There was one around in the beacon; there was one around in the beacon.

Q. That would be just behind her?

A. That would be three or four city blocks, around in there; about three city blocks, I cannot tell you exactly.

Q. Was the steam launch going behind the "Antelope," or coming toward the "Antelope"?

A. Coming toward the "Antelope," yes.

Q. And not over three city blocks behind the "Antelope" when the accident occurred?

A. I say about that; I don't know exactly.

Q. Was any signal of any kind given to this steam launch? A. Not that I heard of.

Q. Do you know whether or not there was any other launch in the immediate vicinity?

A. I don't know whether there was any other launch in the vicinity or not.

Q. This launch that was behind, she was a small

(Testimony of Joseph Whelihan.)

gasoline launch that could be handled quickly, rapidly?

A. Yes, sir; it was the "Sally Sea," I think.

Q. How long a boat is she?

A. She is about the size of the "Wauwinett."

Q. Give us an idea in feet of her length.

A. She is about 30 feet I should judge, long; and about eight or ten feet wide; somewhere around there.

Q. She is a small gasoline launch?

A. Yes, sir. [116]

Cross-examination.

Mr. COONAN.—Q. Which arm did you say Early was carrying his lunch-basket on?

A. I think it was his left arm.

Q. Which hand was he pushing with?

A. His left hand; he was pushing with his left hand, I am pretty certain.

Q. He had his lunch-box in his left hand?

A. Either in his hand or over his shoulder.

Q. Was he pushing outside, or was he on the inside of the door?

A. He was on the inside of the door.

Q. He was pushing immediately back of the door?

A. Kind of in that fashion; in between the other two fellows.

Q. There was a fellow on the outside of him?

A. Yes; there was at the time; but he stepped back, he stepped back to one side a little bit, and then backed up.

Q. Was the fellow on the outside of where the bar

(Testimony of Joseph Whelihan.)

would have been, if he had been in place? A. No.

Q. On the inside? A. Yes, sir.

Q. There were three fellows who were pushing on the door at one time? A. Yes, sir.

Q. Early was between Moss and your brother; is that correct?

A. Yes, sir; with his arm outstretched, that way.

Q. He was on the outside; where was your brother? A. I cannot tell you.

Q. Somebody was on the outside?

A. I think Moss was on the outside; and my kid brother on the inside; I am not certain about that; I am pretty sure of it.

Q. Was Early pushing with his right hand or left hand? A. Right hand, I guess.

Q. Did he push on the door with his left hand?

A. Yes, sir, that way. [117]

Q. Is it not a fact that with one man on the outside, that Early, the first one on the inside, that the man would have to be inside?

A. Here is the door right here; this fellow got up here; this fellow got up here. You can push the door without being on the outside of that door very easily.

Q. In other words, you figure that two men, maybe three men, can push that door at one time, and that one of them will not be across the line that door makes, if the door is in place?

A. I certainly do; I can push it very easily. Me and my brother was on the inside; he grabbed the door and shoved the door; the third fellow was in

(Testimony of Joseph Whelihan.)

there. George was right in the middle.

Q. You stand here, and suppose the door was running this way (indicating). You were on the inside? A. Yes, sir.

Q. Early was right back here, pushing this way?

A. Yes, sir.

Q. Another man would have to be over here?

A. Right here.

Q. This is where the bar runs, how far is that?

A. The bar would be about that far. The man that is on this side will not be very far; they are just as close as this here. He just takes it like this, and shoves it that way. My kid brother was right here.

Q. You estimate the "Sally Sea" to be about 30 feet long?

A. About that; I am not much at estimating.

Q. You are not very good at estimating?

A. No.

Q. Then the distance the "Antelope" may have gone, may have been a little shorter than two blocks?

A. No shorter than two blocks.

Q. At least two blocks?

The COURT.—That is his estimate; he fixes it at two blocks, B to D streets.

The WITNESS.—I don't know just how far the beacon is from B street.

Mr. DICKSON.—Q. You were speaking just now of the "Sally Sea" [118] being around the beacon? A. Yes, sir.

Mr. COONAN.—Q. Where were you where you could see the "Sally Sea"?

(Testimony of Joseph Whelihan.)

A. On the top of the boat. Right after he went over, I went upstairs to see if I could see him; I seen the boat out there then.

Q. How far is it from D street to the beacon?

A. I cannot tell you; about three blocks.

Q. You judge it to be about three blocks?

A. Yes, sir.

Mr. DICKSON.—Q. On opening the door: You say there was a handle on the inside?

A. Yes, sir.

Q. And one of the men had hold of the handle?

A. My kid brother.

Q. When the door stuck, George arose to assist you?

A. Here is the door, right here; Alva is here; this here fellow in between is Early.

Q. All inside of where the bar would have been?

A. Yes, the whole three; when George left go the door, he stepped back this way, to lean up against the door, I judge.

Mr. COONAN.—I move that the last part of the answer go out.

The COURT.—Yes.

Mr. DICKSON.—Q. When George's hand came off the door, then his back was towards the water?

A. Yes, sir.

The COURT.—He stepped back and fell into the water.

Mr. DICKSON.—I want to understand his testimony; that is all.

Testimony of Otto Johnson, for Claimant.

OTTO JOHNSON, called for the claimant, sworn.

Mr. DICKSON.—Q. What is your name?

A. Otto Johnson.

Q. Your residence is in Eureka? A. Yes, sir.

Q. Where were you employed on the 15th day of January, 1915?

A. At the Hammond Lumber Company, at Samoa.

Q. Prior to the time—how long had you been employed with the Hammond Lumber Company?

A. It has been three or four weeks. [119]

Q. During that time, did you cross Humbolt Bay on the steamer “Antelope” going to and from your work? A. Yes, sir.

Q. Were you on the steamer “Antelope” the night of January 15, 1915, when the accident occurred to young Mr. Early? A. Yes, sir.

Q. Where were you sitting at that time?

A. I was laying on the floor.

Q. On the lower deck of the “Antelope”?

A. Yes, sir.

Q. Near the large door? A. Yes, sir.

Q. How far were you sitting from the door, when Early fell through?

A. Oh, about a couple of feet.

Q. Did you see the way the accident occurred?

A. Yes, sir.

Q. Tell the Court what you saw relative to the happening of the accident.

A. I came in kind of late; we had to work late that night, so I came in late, and laid down on the floor.

(Testimony of Otto Johnson.)

I went down on the lower deck. The boat went out like it used to. When it came to this side, some of the young fellows there opened the door, and I thought it was kind of half off. Them young fellows and George Early helped it along, shoved it up. I looked up and saw he was standing looking backwards, where he came from, standing a little out, and he kind of lost his balance sideways, and went into the water, with his lunch basket and what he had in his hand, and his overcoat on; over in the water he went.

Q. On this particular night the bar was not up?

A. No, sir.

Q. Before that time, had that bar always been up there?

A. Well, I have not seen it down the short time I had been there.

Q. All the time you had been there, all the times you rode back and forth on the boat, that bar was up, whether the door was closed or open?

A. I never noticed it any other way.

Q. Were those boys in the habit of opening that door as they approached this side?

A. Well,— [120]

Q. (Intg.) As a regular thing? A. Yes, sir.

Q. You were watching Early, you could see him from the time he arose off the floor to give the other boys a hand with the door? A. Yes, sir.

Q. They had the door nearly opened, before he got up? A. Yes, sir; pretty near.

Q. Then could you see him when he went over

(Testimony of Otto Johnson.)

backwards? A. Yes.

Mr. COONAN.—I object to this, this witness has not testified that he went over backwards.

The WITNESS.—Kind of leaned to sidwards and backwards, both.

Q. Kind of leaned sidwards and backwards?

A. Yes.

Q. He had the appearance to you of being about to lean against something?

Mr. COONAN.—That is objected to as calling for his conclusion.

The COURT.—Q. Which way does this door slide, towards the stern, the stem?

Mr. COONAN.—It slides toward the stern.

Mr. DICKSON.—Q. Which way did that door slide? A. Back.

Q. Towards the stern of the boat? A. Yes, sir.

The COURT.—On the starboard side?

Mr. COONAN.—Yes.

Mr. DICKSON.—Q. Did you see Early after he was in the water? A. Yes, sir.

Q. Did he sink, go down and come up again?

A. He was down about that far.

Q. Was an outcry immediately raised by the passengers; did they shout, “Man overboard”?

A. Yes, sir.

Q. How far were they from the engineer’s room?

A. I don’t know; they were running all over, it looked to me.

Q. Running all over the boat? A. Yes, sir.

Q. Were any small boats lowered?

(Testimony of Otto Johnson.)

A. I did not see any. [121]

Q. After he fell in the water you heard no whistle blown, nor alarm given of any kind? A. No.

Cross-examination.

Mr. COONAN.—Q. Mr. Johnson, when the door was opened upon this occasion, did you see that the bar was not up? A. The bar was down.

Q. You noticed it at that time? A. Yes, sir.

Q. After Early helped close the door, did he step back, or step or walk?

The COURT.—He did not see him close the door.

Mr. COONAN.—Q. You saw him shove against the door: After he pushed against the door to help open it, did he step back or step, or walk?

A. He stepped back, and looked backwards.

Q. Did he look backwards from the side of the boat on to the water? A. Just a little bit.

Q. Did he step out, with one foot upon the ground-rail? A. I could not tell you for sure.

Q. Did you say to me this morning that he stepped out upon the ground-rail?

A. Stepped a short step, but I never measured it.

Q. It is your best knowledge at this time that he stepped upon the ground-rail?

A. Sure, he had to; he could not see outside.

Q. In other words, he did step on it?

A. On that guard-rail.

Q. And went over into the bay? A. Yes, sir.

Q. As near as you can state. he did step out on the guard-rail, and then he fell over? A. Yes, sir.

Q. Did he step across the opening where the bar

(Testimony of Otto Johnson.)

would be if it had been in place? A. Yes, sir.

Q. He stepped across the place where the bar was, on the outside of the door: Is that correct?

A. Yes, sir.

Q. Did you see that door open quite often and the bar up when you crossed the bay?

A. I did not pay much attention to it. [122]

Q. I mean when the door is open, was the bar up?

A. Generally, yes.

Q. Was the bar up when the door was closed?

A. Yes, sir.

Q. Did you ever see it at any time when the door was closed and the bar was not up?

A. I never noticed it.

Q. Did you not tell me this morning that you did remember times when the door was closed and the bar was not up: Did you make that statement to me?

A. Yes, sir.

Q. You made that statement to me this morning, did you not? A. Yes,

Q. Did you make a statement to me this morning that sometimes that door would be closed and the bar would not be up?

A. I never seen it; it might have been.

Q. Didn't you make that statement to me this morning; did you make that statement, or did you not, that you had seen the door closed and the bar not up? A. It might have been.

Q. Did you make that statement to me this morning? A. Sometimes, I don't know.

(Testimony of Otto Johnson.)

Q. How far did the boat go after the accident, will you say?

A. I cannot tell you that; I never measured it.

Q. Did it go beyond her own boat-length?

A. Just about her own boat-length.

Q. I am asking you to give me your best judgment of it. A. About that.

Q. In your judgment, did she go about her own length, or a little bit more?

A. Yes, sir; about that.

Redirect Examination.

Mr. DICKSON.—Q. In answer to Mr. Coonan's question, you said that Mr. Early must have stepped over that ground-rail: You mean by that he must have gone over that ground-rail to have fallen in the water? [123]

Mr. COONAN.—That is objected to; that is not in his evidence; the question is leading, and assumes something not in evidence.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. You made the statement that he stepped over the place where the bar is: What do you mean by that?

A. I mean that he did step backwards a little outside, because he could not look forwards, the way he was standing; then he lost his balance at the same time.

Q. He was leaning in such a way that he lost his balance?

Mr. COONAN.—That question is objected to as leading.

(Testimony of Otto Johnson.)

The COURT.—Objection is sustained.

Mr. DICKSON.—Q. State what Early was doing, so that he would lose his balance?

A. I cannot tell you what he was doing.

Q. Was he standing straight?

A. He was looking forwards, and leaning at the same time.

Q. After he leaned, then did he take any further step, or simply fall?

Mr. COONAN.—That is objected to as leading.

The COURT.—Sustained.

Mr. DICKSON.—Q. When he leaned, what happened, state whether he stepped into the water or fell into the water.

Mr. COONAN.—That is objected to in this specific instance.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. State, after Mr. Early had his hand on the door, did he after that time take a step backwards, or did he fall backwards?

A. He could not fall when he was inside, he had to step outside in order to fall.

Q. From the inside of the door? A. Yes, sir.

Q. Was he inside of the door when he was shoving on it?

A. I don't know; there was three or four of them.

[124]

Q. Were they all together? A. Yes, sir.

Q. From the position where he stood, when he stopped shoving on the door, could he fall directly

(Testimony of Otto Johnson.)

into the water? A. No.

Q. Now, what would prevent him from doing that?

A. The platform outside goes around; it is quite wide.

Q. About how wide is that platform?

A. A foot and a half; something like that.

Q. It is on the width of the platform that you base your answer *no*? You think it was too wide for him to fall over? A. Yes, sir.

Q. You did not exactly see whether he stepped, or whether he leaned over there?

A. He stepped and leaned,—both, you see.

Q. He stepped and he leaned? A. Yes, sir.

Testimony of Emmett Whelihan, for Claimant.

EMMETT WHELIHAN, called for the claimant, sworn.

Mr. DICKSON.—Q. Your name is Emmett Whelihan? A. Yes, sir.

Q. You reside in Eureka? A. Yes, sir.

Q. Where were you working on the 15th day of January, 1915? A. Over at Samoa.

Q. How long had you been working there prior to that time? A. About four or five years.

Q. How much of that time had you resided in Eureka? A. About two years and a half.

The COURT.—The same as your bother?

A. Yes, sir.

Mr. DICKSON.—Q. During those two and a half years, did you cross the bay in the morning to and from your work on the steamer “Antelope”?

(Testimony of Emmett Whelihan.)

A. Yes, sir.

Q. During that time was George Early in the habit of crossing to and from his work every night and morning with you? A. Yes, sir.

Q. You became quite well acquainted with him?

A. Yes, sir.

Q. During that time? A. Yes, sir. [125]

Q. Do you remember the night of the accident?

A. Yes, sir.

Q. Where were you riding that night?

A. I was sitting downstairs on the boat.

Q. Near the large door that opens from the lower deck? A. Right near it.

Q. On the way across the bay, was that open or closed? A. It was closed.

Q. Who opened it?

A. I and Alva Moss opened it.

Q. Were you and Moss expected to get the door open?

A. It got stuck, about one foot before it was all the way open.

Q. Then what happened?

A. George came over and gave us a lift with it.

Q. Did George put his hand and shove on the door with his back to the water and facing towards the inside of the boat?

A. I don't remember; I had my back to both of them; when I saw that door I was shoving like this.

The COURT.—You were facing the water?

A. Yes, sir; kind of half facing the water. I was like this, here is the side of the boat (indicating).

(Testimony of Emmett Whelihan.)

Mr. DICKSON.—Q. You did not know which way George was facing? A. No, sir; I don't.

Q. Did you see him fall in?

A. I saw him just as he hit the water.

Q. In what position was he in?

A. Going right down, floating on his back.

Q. Was the bar up that night? A. No, sir.

Q. Was that bar up before that night, as a regular thing? A. Yes, sir.

Q. Was it always up, whether the door was open or closed? A. Yes, sir.

Q. You boys had a habit, a practice, of leaning up against that [126] bar?

A. Just before we landed, we always leaned on it.

Q. As a regular thing?

A. When we were just getting ready to land; just as we were reaching the wharf.

Q. Just as the whistle blew for the Eureka landing? A. Yes, sir.

Q. It was just at that time that this accident occurred? A. Yes, sir.

Q. Had George been in the habit of leaning against that bar? A. Yes, sir.

Q. Who was it that put the bar in place as a regular thing, before the boat left Samoa?

A. Nick was the regular fellow.

Q. Nick was one of the deck-hands?

A. Yes, sir.

Q. Was Nick on that night? A. No, sir.

Q. How many deck-hands were there that night?

The COURT.—One; that is conceded.

(Testimony of Emmett Whelihan.)

Mr. DICKSON.—Q. Were the boys in the habit of opening that door, as they neared the Eureka side? A. Yes, sir.

Q. Was any objection ever offered to that?

A. No, sir.

Q. No objection had ever been offered?

A. No, sir.

Mr. COONAN.—I object to the question as leading.

The COURT.—Sustained.

Mr. DICKSON.—Q. I will ask you whether or not you ever heard any objection offered?

A. No, sir; I never heard any.

Q. That was your regular post, your regular station, where you always stood or sat on the way over, right near that door?

Mr. COONAN.—That question is objected to as leading.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. Did you see Early after he fell into the water? A. Yes, sir.

Q. Did he sink right down, or did he stay on the surface for some time?

A. He stayed on the surface for quite a while.

Q. How far back did you see him?

A. Until he got away in the [127] back of the boat; then I went upstairs; after he got in back of the boat I could not see him; then I went upstairs.

Q. Could you see him from upstairs?

A. I never seen him after I got upstairs.

Q. Were the other passengers who had been on

(Testimony of Emmett Whelihan.)

the upper deck looking at him when you got up there?

A. Some of them said they seen him; others could not see him.

Q. And the boat kept right on her way?

Mr. COONAN.—That question is objected to as leading.

The COURT.—Sustained.

Mr. DICKSON.—Q. How far did the boat go, after the accident occurred, before she stopped?

A. She must have went a couple of blocks.

Q. The accident occurred where, as in relation to the streets of Eureka?

A. Right down at the Occidental Pond, at B Street.

Q. Where was the "Antelope" stopped?

A. Opposite D Street, about.

Q. Then what was done by the "Antelope"?

A. She just turned about halfway around and drifted back with the wind towards where he went in.

Q. Was any effort made to find him at that time other than just letting the boat drift back?

A. That is all I seen.

Q. Did you hear any whistle blown after he fell into the water? A. I never heard any.

Q. Do you know whether or not there was a launch coming up behind the "Antelope"?

A. There was one of them gasoline boats right behind.

Q. How far behind the "Antelope" was she, when the accident occurred?

A. I don't know. I never saw her until she

(Testimony of Emmett Whelihan.)

passed by the "Antelope," a minute or so afterwards.

Q. A minute or so after the accident occurred?

A. Yes. [128]

Cross-examination.

Mr. COONAN.—Q. Are you acquainted with me?

A. I believe I met you once before.

Q. Do you remember the occasion upon which you met me? A. Yes, sir.

Q. Where was the place that you met me?

A. Over at Somoa.

Q. It was sometime this winter?

A. I guess about two or three months ago.

Q. Was it in February, 1916?

A. I don't remember what month it was.

Q. You do remember the occasion? A. Yes, sir.

Q. Did I ask you at that time questions concerning this case? A. Yes, sir.

Q. And you answered me truthfully?

A. Yes, sir.

Q. After I had finished writing down what you said, I read it over to you? A. Yes, sir.

Q. And I asked you if it was correct?

A. Yes, I think you did.

Q. You said it was correct: is that correct?

A. Yes, sir.

Q. And you finally signed it as being correct, as nearly as you could state, you signed it in your own handwriting; is that correct? A. Yes, sir.

Q. When Early shoved upon this door, which hand did he shove with?

A. I don't remember which hand it was.

(Testimony of Emmett Whelihan.)

Q. Do you think the statement you made to me on February 14, 1916, was correct, concerning which hand he used?

The COURT.—Of course, in fairness to the witness, it requires that you show the statement to him.

Mr. COONAN.—Q. You recognize that statement, do you not? A. Yes, sir.

Q. Just refresh your memory from that statement and tell us which hand Early was shoving with when he went overboard? What did you [129] state at that time?

A. I told you at that time I didn't know which way he was shoving. You tried to make me think that.

Q. Didn't I read this to you? A. Yes, sir.

Q. Didn't I ask you if it was correct?

A. You did.

Q. Didn't I ask you to change it, if it was not correct? A. Yes, sir.

Q. Did you understand it at that time?

A. I told you then I didn't know; you said that he was shoving over.

Q. Did you come to the conclusion that he was shoving or did you believe at that time that he was shoving with his left hand?

A. I don't know exactly what hand he was shoving with.

Q. Then, when you made this statement that he was shoving with his right hand upon this day, you did not state the truth; the truth is you do

(Testimony of Emmett Whelihan.)

not know which hand he was shoving with. Is that correct?

Mr. DICKSON.—This witness has answered two or three times that he did not know.

Mr. COONAN.—Q. When Early fell into the water, did he touch you?

A. He brushed right past me.

Q. What part of your body did he touch?

A. He kicked my heel.

Q. You did not see him? A. No.

Q. You turned around and saw him just before he struck the water; is that correct? A. Yes, sir.

Q. Did you notice that the bar was not in when you started to open the door that night? A. Yes, sir.

Q. There was sufficient light to observe that, was there not? A. Yes, sir.

Q. Referring to this statement down here: "I have seen times when the bar was not up and the door closed." Is that a correct statement, Mr. Whelihan?

A. At very few times it was not up.

Q. But you have seen that door closed and the bar would not be up; [130] is that correct?

A. I saw it not up once that I am positive of; and that was the night George got drowned.

Q. You state here "times when the bar was not up." Have you seen it more than once when it was not up and the door closed?

A. I cannot say that I have.

Q. Then your statement to me is incorrect, the statement you made on February 14th, 1916, is incorrect, in regard to your statement: "I have seen

(Testimony of Emmett Whelihan.)

times when the bar was not up and the door closed.”
Your statement to me was wrong there; is that correct? A. It must have been.

Q. Was this door generally open or generally closed?

A. The door was open most all of the time in good weather, and sometimes when it was windy or rough weather they had it closed.

Q. A great deal of the time the door was open; is that correct? A. Yes, sir.

Q. Would you say that most of the time the door was open? A. Yes, sir.

Q. And the bar was up always?

A. Always up; yes, sir.

Q. Did you have any way whereby you could tell whether the bar was up, when the door was closed?

A. You could not see it unless you opened the door.

Q. Did you ever receive instructions not to open the door? A. No, sir.

Q. Did you ever receive instructions not to take that bar off?

A. Not to take the bar out before they landed.

Q. Is that what they said? A. Yes, sir.

Q. Were you and Early dear friends?

A. Pretty good friends.

Q. Were you pals? A. Yes, sir.

Q. Had you and Early, or Early by himself, often opened that door before? A. Yes, sir. [131]

Q. And did you ever see Early take that bar out?

A. I have seen him—seen nearly all the fellows take it out.

(Testimony of Emmett Whelihan.)

Q. Have you seen Early? A. Yes, sir.

Q. A number of times?

A. Quite a number of times.

Q. Upon this particular evening after Early had assisted in opening the door, you did not see him attempt to look for the bar upon that occasion?

A. I never saw him.

Q. Your back was turned toward him?

A. Yes, sir.

Q. When you three boys were pushing at this door, what was your position—who was on the inside?

A. I was shoving like this; Moss and Early was behind me—I don't know.

Q. Over which shoulder was Early shoving?

A. He was shoving over my left shoulder.

Q. Who was between you and Moss?

A. I don't know how they were; first Moss was right beneath me; then Early came over. I cannot tell you the exact position.

Q. But you know he was shoving on the door?

A. Yes, sir.

Q. Is it possible for three fellows to be pushing on that door and one of them not to be out on the guard-rail? A. Yes, sir.

Q. Was Moss out on the guard-rail on this occasion, when you were shoving?

A. I don't remember.

Q. Was he across the point where the bar should have been? A. I don't think so.

Q. You think he was inside of the place where the bar should have been; is that correct?

(Testimony of Emmett Whelihan.)

A. I would not swear to that.

Q. You don't know whether or not he was out on the guard-rail, or inside of the point where the bar would cross? A. I had my back to him.

Q. Did I understand you to say that no effort was made to rescue this boy?

A. A few of the passengers threw life-preservers out to him. [132]

Q. Did they stop the boat? A. Yes, sir.

Q. Did they back the boat?

A. They just turned her with the stern towards the Island.

Q. Did she go back as far as the place of the accident? A. She drifted that way.

Q. How long do you think she stayed down there after the accident occurred and looked around?

A. She stayed quite awhile, just drifting down.

Redirect Examination.

Mr. DICKSON.—Q. You say as Early fell he brushed past you? A. Yes, sir.

Q. You could feel him brush past you?

A. Yes, sir.

Q. You were in a position where you were inside of the bar, if the bar had been up, as he brushed past you? A. Yes, sir.

Q. Then Early must have fallen from a position inside of the bar? A. Yes, sir.

Mr. COONAN.—That question is objected to as calling for the opinion of the witness and I move to strike it out for that reason; he has just drawn his own conclusion.

(Testimony of Emmett Whelihan.)

The COURT.—It may go out. If he were standing inside of the rail and Early passed him, that would, of course, imply that Early had fallen from a position inside that rail.

Mr. DICKSON.—Q. You said a moment ago that they backed the boat after the accident happened. Did they back her or did she drift down with the tide?

A. She backed up until she got her stern turned right toward the Island, and then drifted the rest of the way.

Q. Just drifted down? A. Yes, sir.

Q. Obviously you were able to observe that was the only effort made to rescue him? A. Yes, sir.

Mr. DICKSON.—That is all. [133]

Mr. COONAN.—Q. From what point did Early proceed to the door?

A. He was inside of the boat, from downstairs.

Q. Was he facing the door?

A. No; he was leaning against the wall on this side of the boat, downstairs.

Q. He walked behind you, behind where he started in to push on the boat?

A. He walked towards me; yes, sir.

Q. For a period of time he was walking toward the door, was he not? A. Yes, sir.

Mr. DICKSON.—Q. You said he was leaning before he went to open the door,—that he was leaning against the side of the ship?

A. I think that is where he was. I am not exactly sure about that.

(Testimony of Emmett Whelihan.)

Q. Do you know which way he was facing?

A. No, I could not say exactly which way he was facing.

Q. Do you know whether he was looking towards the door at that time or whether he was looking towards the inside of the ship?

A. I cannot say exactly which way he was.

Testimony of Frank C. Wilkenson, for Claimant.

FRANK C. WILKENSON, called for the claimant, sworn.

Mr. DICKSON.—Q. Your name is—

A. Frank C. Wilkenson.

Q. Where do you reside?

A. I reside on Harris Street, Eureka.

Q. What is your occupation, Mr. Wilkenson?

A. Marine engineer.

Q. In what occupation were you engaged on the 15th day of January, 1915?

A. I was master of the gasoline boat "Trifina."

Q. Plying the waters of Humboldt Bay?

A. On the waters of Humboldt Bay.

Q. Do you remember the occasion of a passenger falling from the steamer "Antelope" on the way from Samoa to Eureka? A. I do.

Q. Where were you at that time?

A. I was about 300 feet ahead of the steamer "Antelope."

Q. On the gasoline launch "Trifina"?

A. Yes, sir. [134]

Q. Were you near enough to have rendered assistance, if any assistance had been called for?

(Testimony of Frank C. Wilkenson.)

A. I have an idea I was.

Q. You could handle the "Trifina" very quickly, could you not? A. Yes, sir.

Q. Turn or back her or handle her rapidly in any direction, or in any way? A. Yes, sir.

Q. How large a boat is she?

A. She is about 36 feet long, and about 8 feet beam.

Q. You have been connected with ships for some time?

A. I have been on the bay both in charge of steam-boats and gasoline boats for thirty years.

Q. Is there a signal known to people by which they can give an alarm, and call for assistance?

A. Yes, sir.

Q. What is that signal?

A. Successive raps of the whistle.

Q. Was any whistle blown by the "Antelope" at the time that this accident occurred?

A. None that I heard.

Q. If any such signal had been given, if a whistle had been blown, could you have heard it?

A. I believe I would have.

Cross-examination.

Mr. COONAN.—Q. How many whistles did you say should be given in the case of an accident?

A. None that I heard.

Q. What signal should have been given in case of an accident? A. Successive blasts of the whistle.

Q. Any particular number of blasts?

A. Not less than a second or two seconds apart.

(Testimony of Frank C. Wilkenson.)

Q. How many blasts should be given?

A. Successive blasts.

Q. Any limitation upon it? A. No, sir.

Q. Would a signal of that character have informed you that a man had fallen overboard?

A. It would have informed me that something was wrong.

Q. It would not have informed you of the particular thing that was [135] wrong? A. No, sir.

Q. What would you have done?

A. I would have hove to, found out what the trouble was.

Q. Where would you go to? A. Run back.

Q. Where would you go to?

A. To the "Antelope."

Q. It was quite a clear day?

A. Yes, quite a clear day.

Q. On what side of the "Antelope" would you have had to approach?

A. On the starboard side, the lee side.

Q. That is the side furthest down the bay?

A. No, the other side.

Q. That was the lee side?

A. The lee side, the starboard side.

Q. Did you know upon that night anything relative to where this accident occurred?

A. I never knew anything about the accident until the boat arrived at the wharf.

Q. When did you see the "Antelope" slow up?

A. Just as she turned the point between the point and the railroad house, a little this side of that.

(Testimony of Frank C. Wilkenson.)

Q. Down at the Puter Point?

A. At the point of Gunther's Island.

Q. You saw her slow up at that point?

A. Yes, sir.

Q. Did she stop? A. She stopped and backed.

Q. She was just about opposite the railroad warehouse at the time she backed?

A. A little bit below it.

Q. Further down the bay? A. Yes, sir.

Q. Did she stay in that locality for quite awhile?

A. Some little time.

Q. At the time you saw the "Antelope" stop she was a little bit further down the bay than the railroad wharf and she stopped then and backed; is that correct? A. That is correct.

Q. You are sure it was down below the railroad wharf? A. A little below.

Q. Are you positive of that fact? A. Yes, sir.
[136]

Q. It was not any further up the bay?

A. It was no further up.

Q. How far is the easterly corner of the railroad wharf from the easterly corner of the Occidental Mill? A. Less than a quarter of a mile.

Q. It is just a little less; is it not? A. Yes, sir.

Q. In other words, the point that you saw the "Antelope" stop at and back was a little less than a quarter of a mile from the most westerly point of the Occidental Mill Wharf; is that correct?

A. That is correct.

Q. Did she get behind the railroad wharf before

(Testimony of Frank C. Wilkenson.)

she stopped? A. Well—

Q. You would say that she stopped before she got to the end of the railroad wharf? A. Yes, sir.

Mr. DICKSON.—Q. That is as far down the bay as she went? A. Yes, sir.

Q. She was turning around, getting straight?

A. She was drifting kind of quarterly.

Q. Drifting down to as far as the railroad wharf?

A. A little below.

Q. You were all the time coming up the bay in your launch? A. Yes, sir.

Mr. COONAN.—That is objected to as leading.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. At that time which way were you coming in your launch? A. Up the bay.

Q. At what rate of speed were you travelling?

A. I should judge I was travelling between $4\frac{1}{2}$ and 5 knots.

Q. At what distance approximately were you from the “Antelope” when she finally stopped, when she got to her furthest point?

A. I should judge about 300 yards. [137]

Q. When the accident occurred, you were not over 300 yards from her?

Mr. COONAN.—That question is objected to as leading.

The COURT.—Sustained.

Mr. DICKSON.—Q. When did you first learn that an accident had occurred?

A. On the arrival at the dock.

Q. When you arrived at the dock? A. Yes, sir.

(Testimony of Frank C. Wilkenson.)

Q. How long would it have taken you to have gone back to where the "Antelope" was at the time the accident occurred? A. Not over 5 minutes.

Q. Not over that? A. No, sir.

Q. Could you have possibly made it under that?

A. Well, the conditions of the weather,—I might not have.

Q. You have had experience in this line, have you not, Mr. Wilkenson, of rescuing people in the bay?

Mr. COONAN.—The question is objected to as leading.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. I will ask you whether you have had experience, if you have had experience in rescuing people from the waters of Humboldt Bay?

A. I have, both in a boat and out of a boat.

Q. From your knowledge of boats, and marine methods and from your experience in rescuing people, would you give it as your opinion that you could have effected a rescue in this case had you been notified?

Mr. COONAN.—The question is objected to as calling for the conclusion of the witness, that is, without first showing that he is an expert.

Mr. DICKSON.—He has had 30 years' experience.

Mr. COONAN.—I further object that it is not shown that this witness is conversant with the facts of this particular case or that he knows exactly what did happen upon that boat. [138]

The COURT.—That is the chief difficulty of the situation.

(Testimony of Frank C. Wilkenson.)

Mr. COONAN.—He does not know how long the man was on the surface.

The COURT.—And how rapidly the man sank.

Mr. COONAN.—And the tide,—I want you to bring out the condition of the tide and the condition of the wind.

Mr. DICKSON.—Q. I will ask you how long would it have taken you to go from the position where you were when the accident occurred to the man that was in the water.

Mr. COONAN.—That is objected to; it has not been shown that he knows where the accident occurred.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. Do you know where this accident occurred? A. I do.

Q. Do you know approximately where you were at the time it occurred? A. I do.

Q. About how long would it have taken you to go in your launch the “Tritina” from the position where you were then, to the position where the man was in the water?

Mr. COONAN.—That is objected to, because it is not shown by this witness that he knew where he was in the water. He has fixed the “Antelope” at a point where no other witness as here. In the second place there has been no evidence that this man was opposite the “Antelope” or how far distant the body of Early was.

Mr. DICKSON.—He has fixed the position of the “Antelope” when she was at her furthest point

(Testimony of Frank C. Wilkenson.)

down the bay, which was finally down near the railroad wharf.

The COURT.—He has told us where the accident occurred and where he was when the accident occurred. The objection is overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. How long would it have taken you from the position where you were when the accident occurred to go to the place where [139] the man fell overboard?

A. It would have taken me about 5 minutes.

Q. Any more than that?

A. No more than 5 minutes.

Q. You say you have had experience in rescuing people from drowning in the waters of Humboldt Bay?

Mr. COONAN.—That is objected to as leading?

A. Yes, I have.

Mr. DICKSON.—Q. Under conditions that were similar to the conditions that existed here?

Mr. COONAN.—I object to that as leading; and further it assumes that this witness has knowledge of the actual conditions on this day, of the water and tide and wind.

The COURT.—The objection is overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. State if you have had experience before, prior to this, in rescuing persons from drowning on the waters of Humboldt Bay, under similar conditions?

Mr. COONAN.—The same objection.

(Testimony of Frank C. Wilkenson.)

The COURT.—The same ruling.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q From your knowledge in handling boats and your experience in rescuing people in the waters of Humboldt Bay, and your knowledge of the distance of your boat at the time this accident happened, do you think you could have rendered assistance to this man.

A I think I could.

Mr. COONAN.—I desire to interpose the further objection that it is not shown from the facts assumed by counsel, that this witness had knowledge how long the body remained upon the surface.

The COURT.—That has not been shown.

Mr. COONAN.—I move to strike out the answer. I did not have an opportunity to object before the witness answered. You may be [140] permitted to show that this man sank more rapidly than other drowning men sink.

Mr. DICKSON.—A person sinking in the water does not always necessarily remain in the water.

The COURT.—I am not sure that you know, but you may persuade me to believe you, if you insist on asking it.

Cross-examination.

Mr. COONAN.—Q. How many men did you have on board the boat with you?

A. One besides myself.

Q. Was he a member of the crew?

A. He was a member of the crew, the engineer.

Q. You were the pilot?

(Testimony of Frank C. Wilkenson.)

A. Yes. I was the pilot.

Q. Could you have handled the boat, assuming there was a man in the water?

A. I have handled them in worse conditions than that.

Q. Where did you fix the point where the accident occurred?

A. Between the railroad wharf and the point.

Q. And your answers to all of the questions have been that point, and the railroad wharf; is that correct?

A. Between the railroad wharf and Gunther's Point.

Q. Your answers do not refer to any accident that may have occurred at some other point in the bay?

A. No, sir.

Q. Do you figure that a body that has a heavy overcoat on is likely to stay upon the surface of the water for a period of 5 minutes?

A. Well, sometimes they do and sometimes they don't. I have seen bodies floating on the water with over 20 pounds strapped to their back.

Q. You recognize the fact that a body does not stay upon the water for 5 minutes; is that correct?

A. Sometimes they do; sometimes they never do.

Q. Sometimes they sink? A. Some sink, sure.

Q. Within 5 minutes? A. Yes, sir. [141]

Q. If this body had actually been upon the surface of the water before 5 minutes had transpired would you say you could have affected a rescue?

A. Not if he was under the surface of the water.

(Testimony of Frank C. Wilkenson.)

Q. When you saw the steamer "Antelope" sail back, did you think there was anything unusual in the action? A. I did.

Q. Did you offer assistance? A. I did not.

Q. Is it not a fact that not only by successive whistle blasts, but also in an unusual occurrence in the boat's handling, that you would have been informed that something unusual had happened?

A. I could have told.

Q. Would you upon that occasion have been advised by the peculiar handling of the "Antelope" that something was wrong?

A. I knew something was wrong.

Q. Did not the peculiar handling of the steamer "Antelope" inform you as fully as successive blasts of the whistle, that something was wrong?

A. I heard no blast.

Q. Did not the peculiar handling of the "Antelope" inform you as fully as successive blasts would, that something was wrong? A. Yes, sir.

Mr. DICKSON.—That is objected to as immaterial, irrelevant and incompetent. The peculiar handling of the "Antelope" did not occur until after she went two blocks.

The COURT.—Counsel's position is that after he observed this he still did not go back to see what the matter was. I presume that he will argue that he would not turn for successive blasts. He testified that there was a peculiar action on the part of the "Antelope" and as part of this peculiar action he did not go back.

(Testimony of Frank C. Wilkenson.)

Redirect Examination.

Mr. DICKSON.—Q. Would you be advised by the position and action of the “Antelope” that they wanted your assistance the same as if they had blown successive blasts of their whistle? [142]

A. No, I would not.

Q. Is it not a fact from her actions all you knew was that there was something—that she was starting back?

A. I had no idea there was something the matter; the wind was blowing the boat around; they were trying to get the big boat around.

Q. There was nothing in her actions that indicated in your mind they wanted you to go back?

A. Nothing.

Q. If they had blown successive blasts of the whistle, then it would have indicated they wanted assistance?

A. I certainly would have gone back.

Mr. COONAN.—Q. In stating that you could have gone from the place where you were to the point of the accident in 5 minutes, as you started to go you would have gone to the “Antelope” first?

A. I would surely have gone to the “Antelope” and found out the place of the accident.

Q. Wouldn't that have taken more than 5 minutes, and then go to the point where the accident occurred? You think you could still make it in 5 minutes? A. I believe I could.

**Testimony of William Early, for Claimant
(Recalled).**

WILLIAM EARLY, recalled for the claimant.

Mr. DICKSON.—Q. Could George Early swim?

A. Yes, sir.

Q. You have been in swimming with him, haven't you? A. Yes, sir.

Q. Could Early remain upon the surface of the water for as long as 5 minutes? A. Yes, sir.

Q. And even longer, if necessary? A. Yes, sir.

Q. Have you ever seen him swim with his clothes on? A. No, sir.

Q. With his clothes on, and a big overcoat?

A. No, sir.

Q. Do you know how long he could remain upon the surface of the water with his clothing on?

A. No. [143]

Q. Have you yourself swum with your clothes on?

A. No, sir.

Q. Have you any idea how long you could stay on the surface of the water with your clothes on and a big overcoat on?

A. I have an idea about how long I could stay.

Q. Did you observe a scar, a bruise upon his head, after the body was recovered? A. Yes, sir.

Mr. COONAN.—That is objected to as immaterial, irrelevant and incompetent and not cross-examination.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. Did you observe a bruise over one of his eyes after the body was recovered?

(Testimony of William Early.)

A Yes, sir.

Q. Over which eye was it?

A. I don't remember.

Q. Was it a deep bruise?

A. No, it was not very deep.

Q. Was it bleeding? A. No.

Q. Not at the time you saw it? A. Not a bit.

Q. How long after the body was recovered did you see it? A. About 12 hours.

The COURT.—Q. How long after the accident was it before the body was recovered?

A. About 6 hours.

Mr. COONAN.—Q. That the body was recovered?

A. From the time he fell in to the time it was recovered.

Mr. COONAN.—I ask that the answer be stricken out unless this witness can show the actual time.

The WITNESS.—I think it was about 6 hours.

Captain COGGESHALL.—(Intg.) I put the men to work at 8 o'clock, as I recollect it, about 2 o'clock in the morning they recovered the body.

The COURT.—What time do you contend it was, Mr. Coonan?

A. I thought it was 2 hours, but I see I am in error. I will withdraw my statement. The testimony at the coroner's inquest is [144] that the men searched for two hours and some minutes, but it does not state when they commenced to search.

The COURT.—All I was trying to fix, for whatever it was worth, was the length of time.

Mr. COONAN.—Q. When you last saw your brother, he did not have that wound on his head?

(Testimony of William Early.)

A. No, sir.

Mr. DICKSON.—Q. They recovered the body with grappling-irons? A. Yes, sir.

Mr. COONAN.—I object to that question, unless it is shown that the witness knows.

The COURT.—Well, how did they recover it?

Captain COGGESHALL.—They trolled with a big fish-hook and it got into his clothes.

The COURT.—Then did they *did* grapple for it.

Mr. DICKSON.—Q. How long before the accident occurred had you seen him?

A. About 10 hours.

Q. He had no bruise or abrasion over his eye at that time? A. No, sir.

**Testimony of Joseph Whelihan, for Claimant
(Recalled).**

JOSEPH WHELIHAN recalled.

Mr. DICKSON.—Q. Did Mr. Early have any bruise or abrasion over his eye at the time of his falling into the water?

A. No, sir; no bruise at all.

Q. Did anything strike him as he fell into the water? A. No, sir; he fell clear.

Mr. COONAN.—Q. Did he have a lunch-box in his arm? A. Yes, sir; on his arm.

Mr. DICKSON.—Q. Could that possibly have struck him?

Mr. COONAN.—That is objected to as calling for the conclusion of the witness. [145]

The COURT.—He says nothing struck him; and

(Testimony of Emmet Whelihan.)

I suppose that in the general term "nothing" you might even include a lunch-box.

**Testimony of Emmet Whelihan, for Claimant
(Recalled).**

EMMET WHELIHAN, recalled.

Mr. DICKSON.—Q. You saw George Early before he fell into the water? A. Yes, sir.

Q. Was there an abrasion or bruise on his eye?

A. No, sir.

Q. Did anything strike him as he fell into the water? A. Not that I could see.

Q. Your back was turned to him, was it not?

A. Yes, sir.

Q. Were you in a position to see? A. No, sir.

The COURT.—He saw him just as he hit the water, and he fell on his back.

Testimony of Alva Moss, for Claimant (Recalled).

ALVA MOSS, recalled.

Mr. DICKSON.—Q. You saw George Early immediately before he fell into the water?

A. Yes, sir.

Q. Was there any bruise or abrasion over his eye at that time? A. Nothing; I never saw any.

Q. Did anything strike him as he fell?

A. I never saw it.

Q. Were you in a position that you could have seen had anything hit him? A. Yes, sir.

Q. You say nothing struck him?

A. From what I saw.

Q. Did you observe him after he was in the water?

(Testimony of Alva Moss.)

A. Yes, sir.

Q. Did he seem to be strong and vigorous, and able to move his arms? A. Yes, sir.

Q. He only sank part way of the height of his body?

A. I never noticed how far he sank. [146]

Cross-examination.

Mr. COONAN.—Q. Immediately after your accident you threw a life-preserver and then ran upstairs? A. Yes, sir.

Q. Was he sinking then? A. Before.

Q. At that time you got upstairs?

A. I did not see him.

Q. You looked for him?

A. I could not see him.

Mr. DICKSON.—Q. Was that because of the distance the steamer had gone, or was it because of the fact that he was under the water?

Mr. COONAN.—That is objected to as calling for the conclusion of the witness.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. State whether or not there were other passengers there.

The COURT.—Other passengers tried to point him out and could not find him.

Mr. DICKSON.—The claimant rests.

Mr. COONAN.—I would like to ask the Court to take a view of the steamer “Antelope” and that particular door; it will not take over 15 minutes; I believe it will expedite matters.

Captain COGGESHALL.—The steamer “Antelope” will dock at 6:30.

**Testimony of Walter Coggeshall, for Petitioners
(Recalled).**

WALTER COGGESHALL, recalled.

Mr. COONAN.—Q. You testified this morning that you were President of the Coggeshall Launch Company? A. Yes, sir.

Q. You are acquainted with the steamer “Antelope”? A. Absolutely.

Q. You are acquainted with the door that has been referred to in the evidence? A. I am; yes, sir.

Q. What was the custom and practice of the Coggeshall Launch [147] Company in regard to protecting that doorway, when open?

A. Why, this custom was brought about through an order of the United States Inspection Service. The Inspectors came here some five years ago and said: “Now, do you ever open that door”? I said that I did. They said: “If that is the case”—

Mr. DICKSON.—I object to what the inspector said. What the inspector said I do not think would be competent.

The COURT.—If instructions were given by the inspectors and they were followed, it is material. The objection is overruled.

Mr. DICKSON.—Exception.

The WITNESS.—A. The instructions laid down were—the regulation to us—the inspectors said, “You will have to put a bar across this door to have in case this cargo-port is open, and we would advise you to have a bar made and put it across here, and it must be locked.” I said, “All right, I will do so.”

(Testimony of Walter Coggeshall.)

The COURT.—Q. What must be locked?

A. The bar. The bar across the opening must have a lock. I followed the orders of the Steamboat Inspection Service. When the door is closed the people inside here are directed in case of any damage to open that cargo port. I mean by this, the bar across the inside of the cargo port. The orders that I gave to the captain of the boat and that he should transmit to the crew were that under no circumstances should that door ever be open unless at the time it was open the bar should be safely in its place; and failure to do so, and my knowledge of it, was equivalent to a dismissal.

Q. You have said that this bar by the steam-boat regulation was to be locked: Do you mean locked by a padlock?

A. No, sir; with a key, so that it could not be jarred out.

Mr. DICKSON.—Q. Did you instruct the captain of the steamer “Antelope” to see that the bar was in place when the door was open?

Mr. COONAN.—I submit that there was such a regulation; that the [148] regulation came from the head of this company; from Captain Coggeshall. He instructed that these things be done, and I will show that they were actually done.

The COURT.—There is no contention that the bar was not up on other occasions.

Mr. COONAN.—We do not claim that the bar was up on this occasion.

The COURT.—Captain Coggeshall says that the

(Testimony of Walter Coggeshall.)

instructions were that the bar was to be up when the door was open.

Mr. DICKSON.—Why are you objecting?

The COURT.—He has proved the very thing that you prove.

Mr. DICKSON.—As to whether the bar was up and the door was open; I want to ask what his instructions were and if it was in accordance with those instructions that the bar was kept in when the door was open.

Mr. COONAN.—We have met an issue that it was customary to put that bar there when the door was closed. I am going to prove that the instructions from the Government were to keep the bar in when the door was open, and nothing was said otherwise.

Mr. DICKSON.—I object on the general ground that the evidence is insufficient.

The COURT.—Why,—when they are proving the same thing that you are proving, and you are objecting.

Mr. DICKSON.—I object to it on the ground it is incompetent what the instructions were; it does not go to prove what the facts were; they may have disregarded the instructions.

Mr. COONAN.—I will state at this time that the bar was not up on this occasion. I want to state that the bar did not have to be up.

Mr. DICKSON.—It is objected to as incompetent.

The COURT.—The objection is overruled.

Mr. DICKSON.—Exception.

Mr. COONAN.—What were your instructions in

(Testimony of Walter Coggeshall.)

regard to that freight-bar, [149] when the door was closed.

A. I had no instructions when the door is closed. My instructions from the inspectors were that I should maintain a bar available to put across that cargo port when it should be open. When the cargo port is closed it requires nothing in front of it. The inside of the ship is just as closed as this room; it is impossible to fall overboard. But if we did elect to open that cargo port for ventilation or for other purposes, then they must have a bar to take its place. Furthermore, from this moment that I got the instructions from the steamboat inspectors I had that bar made, and I notified my master, I notified him personally, and I know he notified the crew, and I notified them—my instruction was that a failure to conform with the orders of the officers of the Steamboat Inspection Service would result in discharge on my part, as it was a very important thing, and to my knowledge that order was issued and was never violated by one of these men. If they opened that door they never failed to put that bar in place.

The COURT.—Q. As far as you know?

A. Yes.

Mr. COONAN.—Q. Did you ever receive an instruction from the inspectors that you should keep that bar in at all times.

A. They said, "You must put the bar in if the door is open."

Q. Did you ever receive an instruction to keep that bar in when the door was closed?

(Testimony of Walter Coggeshall.)

A. No, sir; they would not think of giving me any such orders. It would be a foolish instruction.

Q. How is that sliding-door held? Is it fastened?

A. It is not fastened.

Q. Why is it not fastened?

A. Because, if it be fastened and anything happened on the ship, like a collision, instead of being at the Federal Court I would probably be here for manslaughter.

Q. I want the specific reason why that door is not fastened? [150]

A. Because it is an avenue of escape, in case of accident.

Q. Are you required to keep an avenue of escape?

A. We are required to keep two avenues of escape.

Q. For what purpose?

A. In case of injury to the ship of any kind, any kind of an accident between ships.

Q. Is that the same reason why you did not fasten or lock the bar also when it was put in place?

A. The bar is simply fastened with a pin. By the word "lock" that does not mean as you would put a padlock on it; it simply means a pin right through. There were many accidents resulting years ago and they were ordered to put bars on steamers, and later, when a man went overboard, as the result of that accident the law requires that all bars must be locked with a key.

Q. Was this door used for?

A. It is used primarily as a cargo port, to take cargo on and off the ship.

(Testimony of Walter Coggeshall.)

Q. Is it ever designated by the company as a place of entrance and exit to and from the steamer "Antelope" by passengers?

A. Under certain conditions.

Mr. DICKSON.—That question is objected to.

The COURT.—Objection overruled.

Mr. DICKSON.—Exception.

The WITNESS.—(Continuing.) Under certain conditions, it is used as a passenger port.

Mr. COONAN.—Q. Under what conditions is it used as a passenger exit and entrance?

A. As applied to this case.

Q. I wish you to state, as a general proposition, when was it used as a passenger entrance and exit?

A. As a general proposition,—the starboard side of the ship is for the passenger service. When she goes to Samoa she lands on the starboard side to the dock. It was the starboard side that this accident happened from. Over at Samoa we have a long wide gang-plank, [151] about 6 feet wide, that we haul aboard into this cargo port. We always have on top of the ship 100 going back; some 300 come, and in order to get on every night, they come running down this *man* gang-plank, a certain portion go between the decks, another portion go on board over these planks, on the upper deck. These are the only conditions under which we use that cargo port as a passenger port, strictly, to get the passengers on the ship, at Samoa.

Q. At the Eureka landing, do you ever use that cargo port for the entrance or exit of passengers?

(Testimony of Walter Coggeshall.)

A. I have seen that used a few times when the upper gang-planks were out of condition. There are two sliding planks that hang on *on* wire lines. I have known occasions where these gang-planks have been out of business; when the tides have been high, and we have had to elect to take out passengers through the cargo port.

Q. When you elect to take passengers through the cargo port, do you notify them of that fact?

A. Yes, sir; we notify the master of the ship; we arrange that; there is a man down there to handle that cargo port.

Q. Did you ever give instructions to Captain Thompson, or his men, that they could not make the lower-deck cargo port a means of exit?

A. I have done so. He has instructed me that his words were idle; he could not help using it.

Q. Why?

A. He had instructed his deck-hands, but the men were in such a haste to get out that he could not get his men to send down there; in their haste to get through they would threaten a deck-hand that was sent down there.

Q. Did Captain Kronkie, to your own knowledge, ever take measures of any kind of preventing the men making an exit of that lower deck?

A. As a matter of fact I have threatened Captain Krohnie with discharge if he could not remedy that thing. I [152] told him that it seemed to me that he ought to be man enough to handle that thing. He invited me to come over, so we figured on matters,

(Testimony of Walter Coggeshall.)

and finally he put a padlock on that door, and I would assume that there may have been a padlock for a night or two, and when I found that Krohnkie had padlocked that, I remonstrated with him for padlocking that door; and told him to take that off, that he was going against the Steamboat Inspector's Instructions.

Q. Did any other captain ever make any attempt to—
A. Yes, Captain Cahl.

Q. Will you state the measures that he put into operation and the unsuccessful results of his measures?

A. At one time when he was in charge of the ship, he went so far as to throw water down on some of them, and then he took the hose from the engine-room and squirted water, so that the water came on deck, and ran down, so that the men would not want to come out on the outside of the ship, for fear of getting wet. There was everything done that could be reasonably done to keep the men from coming through and taking these risks of opening this door and taking down that bar. I have done everything that I know of and spoken to them.

Q. Did Captain Cahl suffer anything at the hands of the passengers that you say objected because of his methods?

A. Yes; he got a severe beating one morning.

Mr. DICKSON.—I object to it unless he fixes the time.

A. It was a winter's morning three years ago. This is 1916. It would be four years ago; it would

(Testimony of Walter Coggeshall.)

be somewhere in the month of January or February in a winter's morning, at about 6:20. The boat leaves at 6:20. A man came out through this same cargo port, and an officer of the ship, a man said to him, demanded that he should go back, and the man told him to go to hell, and refused to go back. Captain Cahl had to leave very shortly and the next [153] morning this man was on the dock laying for him. They had a fight, and Cahl was beaten up as a result to enforce this regulation and keep the men in there.

Q. Have you observed that door closed and the bar not in place, on the outside of the door?

A. Yes. We leave the dock here and are taking in freight, and the minute they get the freight in they start forth and the deck-hands close that door and she proceeds to Samoa. The reason why that bar is up many times is as follows: Suppose that you leave Samoa, and the bar is up; then it gets chilly for the people between decks; somebody goes and shuts the door; then you have the combination of the bar being up and the door closed; that is just a case of having the bar up and the door closed; one of these two things is mandatory upon that deck. You must either close the door, or have the bar up, and then it is fulfilling those orders.

Q. If that door would be closed, to your best recollection that bar would not be up, on the outside?

A. Yes, sir.

Q. Did that condition exist immediately prior to the 15th day of January, 1915?

(Testimony of Walter Coggeshall.)

A. Yes, sir; it existed all the time; sometimes that bar is up and the door is closed; another time the bar is not up, and the cargo port is closed. The bar is up by chance when the door is closed. If one of my men close that cargo port, they have fulfilled the orders, and they go about their other duties. They do not worry about that any further. One man, unless he is an expert, cannot open that door; two men have all they can do to open it. Therefore, when it is closed it is closed, and he goes on about his business.

Q. Whose duty was it to close that door on leaving Samoa for Eureka?

A. If it is not otherwise closed, it is No. 2 deck-hand's duty. We have No. 1 and No. 2 deck-hands.

Q. On January 15, who was No. 2 deck-hand.
[154]

A. We had no No. 2 deck-hand; No. 1 deck-hand was sick so No. 2 deck-hand was acting in his place.

Q. Was it No. 1 or No. 2 deck-hand's place to close the door? A. No. 2.

Q. No. 1 acts as purser and takes the tickets?

A. On her main deck; No. 2's business is to look out to see that the cargo port is closed, or the bar is put up.

Q. On January 15, 1915, who was No. 2 deck-hand?

A. Mr. Knudsen.

Q. Had it ever been the duty of Nick Muster to close that lower door?

A. Not to my knowledge; he is No. 1 deck-hand or purser; his business is to look out for the tickets.

(Testimony of Walter Coggeshall.)

No. 2 deck-hand attends to the freight and things between decks.

Q. After the cargo port is closed, where does the duty of No. 2 deck-hand next take him?

A. No. 2 is down between decks. After he has made her safe he goes up on her passenger deck; his next duty is to assist in the disembarkation of the passengers when they get on the Eureka side.

Q. After the cargo port is closed, what is the next duty on the boat of No. 1 deck-hand?

A. No. 1 he stands by on deck. Both men are preparing, standing by until such times as they shall go to Eureka; they are subject to any orders of the master of the boat; if he wants a deck-hand he whistles.

Q. When you refer to the upper deck, you mean which deck?

A. The passenger-deck; the between decks is the freight decks. The passenger-deck is where the exits or gangways are from the street; the passenger gangways.

Q. How long had Captain Knudsen been in command of this ship on January 15, 1915?

A. I would say—I would judge he had been there for several months.

Q. What papers did he have?

A. Master's papers.

Q. For a bay or sea-going ship?

A. He had master's papers [155] for the bay—pilot papers for the bar, and master's papers outside.

You have had considerable experience in marine

(Testimony of Walter Coggeshall.)

matters, haven't you? A. Yes, sir; I have.

Q. Under whose charge are the deck-hands?

A. Under the masters, absolutely.

Q. Do you as president and manager of the Coggeshall Launch Company ever give them instructions directly?

A. Not exactly; I do not think I have ever given them direct instructions except in the case when this matter came up about this cargo port and this door; and I considered this of sufficient importance that I should speak to the captain, and I included all hands; I laid down the law to all hands and I made the captain equally responsible with the men; if it was proven that he was negligent, that he did not make the men stay by their orders that he would lose his job.

Q. Who did the men report to every day?

A. The master; no one else.

Q. They did not report to you? A. No, sir.

Q. How many trips over every day did the "Antelope" make on January 15, 1915?

A. A round trip in the morning, a passenger run, a round trip in the evening, a passenger run, and she makes an afternoon freight run over to Samoa.

Q. All of these runs are from Samoa and back to Eureka? A. Yes, sir.

Q. How long a time does it take the "Antelope"?

A. About two miles.

Q. How long a time does it take the "Antelope" to make that trip?

A. About 15 minutes; that is, the way we run it; we do not hurry.

(Testimony of Walter Coggeshall.)

Q. Did you ever give any instructions to Captain Knudsen with regard to operating with a full crew?
[156]

A. No, sir; I would not have to give those instructions, because he knows himself. He knows the ship's paper and how many men it calls for.

Q. As a sea-faring man, what is his duty in regard to operating the boat when it is one man short?

A. It is his duty to fill out his equipment of men, as specified in the ship's papers.

Q. Did he notify you on or about January 15, 1915, that he was one man short? A. He did not.

Q. What was the first knowledge you had of that fact?

A. That night, after the accident. I did not know of the accident until about 7 o'clock. My telephone rang, and then someone wanted to know if I knew there was one man short on the ship,—Mr. Walden of Samoa.

Q. Can you estimate the number of trips the steamer "Antelope" has made during her life, to and from Samoa? A. On passenger runs?

Q. On this regular ferry system she maintains?

A. 320 trips a year, for five years, would be 1600; about 1600 regular ferry trips.

Q. How many men on the average does she carry each trip? A. It varies from 225 to 250 or 260.

Q. A day? A. Yes, sir.

Q. She has actually carried passengers something in excess of 200 times 1600 during the term of her life?

(Testimony of Walter Coggeshall.)

A. It is safe to say an average of 250; those figures are correct.

Q. Therefore, she has carried during the term of her life, something over 300,000 passengers?

A. Yes, sir.

Q. During all of that time have you any knowledge of an accident similar to this in character?

Mr. DICKSON.—I object to that.

The COURT.—What is this for? [157]

Mr. COONAN.—I want to show that she has carried a number of passengers without an accident of that kind. I have a decision here, if you would like to hear it.

The COURT.—I will admit it.

Mr. DICKSON.—I move that it be stricken out.

The COURT.—It is not subject to a motion to strike out.

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. During all of this period of time, and during all of this time that passengers were carried, do you know of any accident occurring on the steamer “Antelope” similar to the one of the loss of life of George Early?

A. I know it is a matter of common knowledge that no man was ever drowned before or since, off of the steamer.

Cross-examination.

Mr. DICKSON.—Q. Your duties do not very often take you aboard the “Antelope,” do they?

A. Oh, yes, they do.

Q. About how often would you be on one of these

(Testimony of Walter Coggeshall.)

trips coming from Samoa to Eureka?

A. I am on these particular trips very often.

Q. You said you did not discover that you were one man short until you had been notified by Mr. Walden? A. Yes, sir.

Q. Did you discover at any time how long you had been a man short?

A. I was told afterwards that a man had been for two or three days; I do not know how long, because I do not dock the men when they are sick.

Q. So you did not know how long that man was off?

A. I know by hearsay; I was told he had been off three or four days.

Q. That is all the knowledge you have of it?

A. Yes, that is all the knowledge I have of it.

Q. Were you also informed that he had been sick and in the hospital?

A. If I was informed of it, I do not remember how long [158] he had been in the hospital; he had been in the hospital a great deal; I was told that he was in the hospital at that time.

Q. On these various occasions that he was in the hospital has there been any other man to take his place?

A. Most assuredly. That is the first time that ship was without her full complement of men.

Q. That is the only time? A. Yes, sir.

Q. Since you have owned her?

A. Yes, sir. And she would not have been short then, if I had known it.

(Testimony of Walter Coggeshall.)

Q. You say that the duty of having a full complement of deck-hands is delegated entirely to the master? A. Yes, sir.

Q. What would you have done if you had found out, found that out,—would you have gone and gotten another deck-hand?

A. I don't know; had I known it I most assuredly would have seen that a man was put on.

Q. Then the duty was not entirely delegated to the captain?

A. It was delegated to the captain. Had I known that there was anything irregular in the conduct of the ship by the captain, I would have gone after the captain and compelled him to put that man on there; the captain hires the men; I don't hire the men.

Q. How far is your office on the Eureka side from where the "Antelope" docks?

A. About—well, 60 or 75 feet.

Mr. COONAN.—I wish you would fix the time that you refer to?

Mr. DICKSON.—Q. At these various times when this deck-hand was in the hospital?

A. He has been in the hospital for the last four years, ever since he has been employed, off and on; sometimes it has been 75 feet, from my office, to where she docked. Then when she docked at G street I would assume that she is 275 feet, that is, from my office to the ship. [159]

Q. You made it a practice to be there when she docked, did you?

A. I didn't make it a practice; I am there a great

(Testimony of Walter Coggeshall.)

deal. I am there if I consider it to my interests to be there.

Q. On these previous occasions when this man was sick and in the hospital?

A. I said I had no knowledge—you mean this time of the accident?

Q. I am speaking as to other times?

A. There were other times when he was in the hospital that I had knowledge of it; yes, sir.

Q. On these occasions you say a man had been put in to fill his place? A. Yes, sir.

Q. When did you learn of the fact that another man had been put in his place on these other occasions?

A. On these other occasions why, when he went away; there was always a man in his place.

Q. How do you know that?

A. How do I know that?

Q. Yes.

A. At the time that he went off this time, I understood in talking with Knudsen, Knudsen told me that when the man went off, that he would be right back. In other times, he has been a very sick man and I have assisted him, I have always known that he was off.

Q. This is the only occasion of those occasions that you did not know there was not a man to take his place?

A. This is the only time that there was not a man to take his place.

Q. On all other occasions that was brought to

(Testimony of Walter Coggeshall.)

your knowledge and you knew there was another man to take his place?

A. After this first time when this accident happened it was the beginning of an operation and he was off one or two days after that; and before he was off, he was in the office and was getting worse; I advised him to lay off, and have always known there was a man in his place. I do not hire the men, but I know a man was there. To make the explanation simple, the captain of the ship in [160] this one instance was derelict in his duty. The law tells him what he must do. At that time he did not obey the law, but it has always been obeyed ever since.

Q. You got rid of this captain immediately afterwards?

A. In a little while, it must have been a month; I cannot say just how long it was.

Q. It was not more than two or three days, was it?

A. I know he was not there long.

Q. You regarded him as a dangerous man in that vessel? A. No, I did not.

Q. You state that he was derelict in his duty?

A. That is all right; sometimes they are much more faithful man than before, before they do that; especially in the seafaring business. That was not the reason of his discharge at all.

Q. You said that it was the duty of No. 2 deck-hand to always close that door on the Samoa side?

A. Not to close it, to see that it was closed; he must ascertain that it was closed before he proceeded

(Testimony of Walter Coggeshall.)

from the freight deck to the upper deck. That was his first business when the ship left the dock.

Q. And while he was attending to that what was No. 1 deck-hand doing?

A. At that time, letting go these two planks and letting go of the stern-line.

Q. He had been taking up tickets?

A. When he let go the line and put those planks aboard, the tickets are all taken up.

Q. All the time passengers are taken aboard one of the men must be on the upper deck?

A. His position was on the upper deck that is, if he was on there taking tickets.

Q. He remained at that position until the vessel was cleared a port?

A. Yes, sir; that is, he looked out for these gang-planks and the other man looks out for the gangway, to see that the cargo [161] port is properly closed, and he proceeds upon the main deck.

Q. That is, if No. 2 deck-hand was off duty and there was no man to take his place, that left No. 1 to go up and take the tickets?

Mr. COONAN.—I object to that as assuming something not in evidence.

The COURT.—The other witnesses have all testified that No. 1 deck-hand was the one who always closed that door and put up that bar. The objection is overruled.

Mr. COONAN.—Exception.

A. These men have all bought these tickets by about the 8th of the month. In the morning, when

(Testimony of Walter Coggeshall.)

we leave on the Eureka side the men are in a great hurry to get aboard. We have only as a rule one gang-plank out. This man, No. 1 deck-hand, actually takes the tickets at that time; he tears these tickets. If it is the 2d of the month, he will take No. 2 off. When they come aboard from the other side at night, as a matter of fact, these 200 just come plunging aboard, and you cannot take these tickets at that time; his position is at the gang-plank just the same. If No. 1 was away the tickets were not taken. They know the people; the people come aboard; but the position of the men is the same at these two gang-planks. You cannot hold all of these men to pick up those tickets.

Q. You say Nick was deck-hand No. 1?

A. He was.

Q. What was the name of deck-hand No. 2?

A. Knudsen.

Q. On this particular night when Nick was not there, do you know what position Knudsen took?

A. I was not aboard the ship; I do not know.

Q. You testified that the regulations of the Inspectors of Steamboat Service were very strict to the effect that there must be a bar there when the door is open?

A. Yes, sir. If we elected to open the door we must replace it with the bar. [162]

Q. Did they not give you these strict instructions limiting you to those times when you yourself opened the door?

A. Me personally?

(Testimony of Walter Coggeshall.)

Q. Any of your men?

Mr. COONAN.—I object to this question as calling for the conclusion of the witness. The witness would not know what was in the minds of the inspectors at the time they gave the instructions.

The WITNESS.—I do not understand that question.

The COURT.—What he means is this: You say that the inspectors instructed you that you should put up the bar when the door was open. Did they say that should be done by anybody else except by you or some members of the ship?

The WITNESS.—That it should be carried out on the ship.

Mr. DICKSON.—Q. I am speaking of the instructions of the inspectors: Did they give you any instructions as to what should be done when anybody besides some member of your crew opened the door?

A. No, sir; they would not give me instructions about other people because other people are not supposed to open that cargo port on the ship. Those are supposed to be in charge of the crew of the ship. They would not naturally give instructions covering that because no one has a right to interfere with the management of the ship.

The COURT.—That is true, but you have testified that it is the custom for passengers to open that cargo door, and nobody objected to it?

A. We did object. That door was locked with a padlock and we could not stop them.

Mr. DICKSON.—Q. Then it was customary for

(Testimony of Walter Coggeshall.)

the passengers to open that door and you could not stop them?

A. It certainly was customary, and if we were to have a deck-hand there, we would have to have a prizefighter, because if any man would try to stop those fellows, why, he would certainly get the licking of his life. I [163] have had deck-hands tell me that they would not be safe if they had to stay there. It is just craziness to go there. We have stationed men down there, and I have had men come to me themselves and say that they had been ordered down there and were going to leave the ship because the men interefered with that cargo port.

Q. Why did you ever station a man down there?

A. Because we did not want that cargo port open if we could help it.

Q. You recognized it was a dangerous situation?

A. Why certainly. If you are in a ship like the "Topeka" upon the sea, you have to go down between-decks and open your cargo ports; it is certainly a dangerous proposition with the proportion of crew compared in proportion to the passengers. They can stop that. It is a large crew and a small number of passengers. They can control those people. But if you change the proportion and have a crew of two or three and a passenger list of 250, you will find all those people piling in, opening that cargo port and you cannot control it.

Q. That is the reason they are allowed to do it?

A. They were not allowed to do it; they simply took possession and did it; it is done. You take any

(Testimony of Walter Coggeshall.)

public boat that is returning working men, work fellows that are in a hurry, at night, and you will find that those practices prevail.

Mr. DICKSON.—I object to his statement; it is not responsive to any question.

The COURT.—Let it go out.

Mr. DICKSON.—Q. About how many of the passengers, captain, were riding on what you term the between-decks?

A. It would depend on the weather. If it is fine weather why there is a large proportion right outside; and if it is bad weather there is a large proportion inside. The capacity down there would be,—I will estimate it at 40 men, when it is filled up.
[164]

Q. It would be quite an ordinary occurrence to have 40 men down there on a winter evening?

A. I should judge so. I never counted them, you understand; I am just giving you what the capacity for passengers would be there.

Redirect Examination.

Mr. COONAN.—Q. In January, 1915, where did the “Antelope” dock?

A. She docked at the end of G street.

Q. How far distant is that from your office?

A. I should judge from my office it is 275 feet.

Q. At the present time where does she dock?

A. Between F and G streets; nearer to F. Her stern is supposed to be 30 feet from the sidewalk running on F street.

Q. When you said that the boat docked 75 feet

(Testimony of Walter Coggeshall.)

from your office, you had reference to the present time, and not to January, 1915?

A. At the present time; that is where she docks now.

Q. Captain, in January, 1915, did you have other interests besides the particular boat "Antelope?"

A. Did I have other interests?

The COURT.—Other business interests?

The WITNESS.—Yes. The United States Mail Contract, the carrying of the United States Mail between Samoa and Eureka and my boat business to look after.

Mr. COONAN.—Q. Did you operate a marine exchange at that time? A. Yes, sir.

Q. Were there other boats besides the "Antelope" operated as a ferry between Eureka and Samoa?

A. Yes, sir; we maintained a regular ferry system.

Q. How many boats?

A. Only one at that time.

Q. How many boats are there for that purpose?

A. Four that are available for that ferry system.

Q. At one time? A. Yes, sir. [165]

Q. Do you do any lightering business?

A. Yes, sir.

Q. In other words, you had quite a number of interests besides the "Antelope" in January, 1915?

A. Yes, sir.

Q. Why did you discharge Captain Knudsen?

Mr. DICKSON.—I object to that; I do not see any reason why that should be brought in.

The COURT.—The objection is overruled.

(Testimony of Walter Coggeshall.)

Mr. DICKSON.—Exception.

A. I discharged him because after this accident I put a man aboard a competent man, and the boat came in, and he sent this man up to the office. I never before hired these men, but I wanted this man to stay there; this man made the first trip in the morning and came to my office, and when he came in I asked him what he was doing; he said he was fired by Captain Knudsen. He said, "I told him to go to green." He asked me if you gave me the orders; I said "Yes." Then I asked him, "What did he say?" "He told me to tell you to go to hell," that he was hiring men for the ship. He said he was able to hire men. I said, "There is one case where I am going to hire the men." I wanted that man kept aboard, and Knudsen fired him and I fired Knudsen.

Q. You stated on cross-examination that you considered that it was dangerous to go ashore at Eureka through the cargo port door on the lower deck?

A. It is dangerous, unless we elect to put out that plank, and then it is dangerous at certain times of the tide.

Q. Why is it dangerous?

Mr. DICKSON.—I cannot see the materiality of that question at all. The accident happened out on the water. He is asking about after the boat lands.

The COURT.—You are endeavoring to fix the responsibility of the ship, because this door happened to be open. The captain has [166] stated that they do not want them to open that door because it

(Testimony of Walter Coggeshall.)

was dangerous. The boys all testified that they would open it when they were drawing close to the wharf. I think we ought to know what elements are in the whole situation. The objection is overruled.

Mr. DICKSON.—Exception.

The COURT.—Q. What are they?

Mr. COONAN.—Q. What are the elements that in your estimation constitute the danger at the Eureka side?

A. It is very dangerous for two reasons, subject to the tide and weather; and then the distance of the plank from the side of the ship. This big gang-plank,—when the ship lands alongside of the dock, if you went to jump from the side of the ship, if you miss the plank you will go overboard, between the ship and the dock. Now, the reason why we do not use the big gang-plank is first it takes so long to get it aboard; and secondly, there would be danger at certain stages of the tide. It is dangerous for the men to go out of that cargo port and go on that plank because in the first place that plank is hung by wires. When the men jump from that ship on to that plank, a large number of them, say a hundred, if it happened that the guys would let go, the planks would fall in the bite of the chain and the chain would have the weight of the plank and the weight of the men on it. This chain is supplemental; it cannot held the weight of these gang-planks and all these men. The chain is liable to let go, and these men would be precipitated into the bay, and go under the side of the ship and some of them

(Testimony of Walter Coggeshall.)

would be drowned. It cannot be used except at extreme low tide, and it is dangerous at all times unless we have men to hold that gang-plank aboard.

Q. State what happens when a dozen men go on that plank at one time.

A. We have that plank as a matter of safety; we have a [167] chain on it; if anybody jumps on it you have got the added weight of the men down on the chain.

Q. As the weight goes down, does the distance between the boat and the plank increase or diminish?

A. It increases.

Q. It becomes greater?

A. As the weight goes down the distance from the ship increases.

Q. Suppose a man happens to miss the edge of the plank in jumping from the ship, where would he land? A. Right in the bay.

Q. In the water?

A. Yes; and there is no way to get him out.

Mr. DICKSON.—Q. Then you would say that it was extremely dangerous to have any cargo port open?

A. Not at all; if the instructions of the inspectors are followed and the bar is put up in its place.

Q. It is all right if the bar was there?

A. Yes, sir; and it is nobody's business to open that door except the crew under our instructions.

(An adjournment was here taken until tomorrow, Friday, July 7th, 1916, at 10 A. M.)

Friday, July 7, 1916.

Testimony of James Mason, for Petitioner.

JAMES MASON, called for the petitioner, sworn.

Mr. COONAN.—Q. Where do you live?

A. I live in Eureka.

Q. Where are you employed?

A. At the Hammond Lumber Company, at Samoa.

Q. How many years have you been employed in the company?

A. To the present time?

Q. Yes, sir. A. 11 years last March.

Q. How long prior to January 15, 1915, had you been employed by the Hammond Lumber Company?

A. Somewhere about nine years. [168]

Q. Did you travel to your work and from your work upon the steamer “Antelope”?

A. Yes, sir. always.

Q. Each day? A. Yes, sir.

Q. Where was your usual and customary place of riding? A. On the lower deck.

Q. Do you remember the accident that resulted in the death of George D. Early A. I do.

Q. Immediately prior to that day, referring to immediately prior to that day, I will ask you whether or not a certain man in the crew of the steamer “Antelope” customarily either closed that cargo port door or put up the bar?

Mr. DICKSON.—I object to the form of the question.

The COURT.—The question is leading in form.

Mr. COONAN.—Q. Did you observe whose duty

(Testimony of James Mason.)

it was to close the cargo ports upon the steamer "Antelope"?

A. It was supposed to be No. 2 deck-hand's.

Q. Who was No. 2 deck-hand at that time?

A. I cannot tell you.

Q. Was it a man by the name of Knudsen or Muster?

A. Muster was not there; he was at the hospital at the time. Knudsen was supposed to be No. 1, was he not? He was collecting the tickets, anyhow.

Q. I mean the day before that day.

A. And some other fellow, I do not know who he was.

Q. Who usually closed the cargo port door or put up the bar on coming from Samoa to Eureka?

A. No. 2 deck-hand.

The COURT.—Q. Who was he? What was his name?

A. I do not know.

Q. Did Muster do it when he was there?

A. Muster, yes, Muster he was supposed to do it.

Q. I am asking you did he do it when he was on the ship?

A. I never seen him close the door in the evening. I see him put [169] the bar up in the morning the different times, because he is always there, ahead of the others, I have seen him.

Mr. COONAN.—Q. Did you ever hear either of the deck-hands, or any officer of the boat, instruct the men not to shut that door, and not to touch the bar?

(Testimony of James Mason.)

A. I have.

Q. Did you hear them repeatedly do that?

A. I did hear them at different times.

Q. Did the men disregard those instructions, or did they obey them? A. No, sir, they did not.

Q. How would they act in speaking of those instructions?

A. They would open the door and take the bar down when they got to the wharf.

Q. Did you ever see a member of the crew try to stop them by force about January—

Mr. DICKSON.—(Intg.) January 15, 1915.

A. Well, I have seen Nick at different times come down, and he would lay on the bar that was across there, and the boys would go under it and over it.

Q. Would he be telling them not to go that way, at that time? A. Yes, sir.

Q. They would go out on the guard-rail?

A. Yes, sir, they would go and line up along the whole front of the boat.

Q. And they climbed on to the wharf from the guard-rail? A. Yes, sir.

Q. They would not go upstairs and go off the gang-plank?

A. No, they never did; I guess I was just as bad as the rest of them.

Q. Mr. Mason, have you seen that door closed and the bar not in? A. Yes, sir; I have. [170]

Q. Very many times?

A. Different times, I could not say very many.

Q. You have seen the door open and the bar up?

(Testimony of James Mason.)

A. Yes, sir.

Q. Was that the usual condition of that cargo port there?

A. Sometimes when the weather was fine.

Q. You have seen that door closed and the bar not up? A. Yes, sir, I have.

Q. Were you on board the evening of this accident? A. Yes, sir, I was.

Q. Did you see any of the particulars concerning the accident? A. The boy going over; no, sir.

Q. Did you go to the cargo-port door and attempt to see him? A. No, sir.

Q. Did you go any place?

A. Yes, sir; on deck.

Q. Could you see him?

A. No, sir, I could not see him.

Q. How long did it take you to walk from the lower deck to the upper deck?

A. At the outside, not over two minutes. When I see them pull down the life-preservers, I jumped up and ran up on the deck. Somebody said there was a man overboard, but I could not see him.

Q. Was there sufficient light to have seen him if he was above the water?

A. Yes, sir, I could have seen a good distance.

Cross-examination.

Mr. DICKSON.—Q. This was a windy, cold night, was it not?

A. Yes; it was kind of windy; it was cold, I guess cool.

Q. There was a northwest wind?

(Testimony of James Mason.)

A. I think so, yes, sir.

Q. The bay was pretty choppy, was it not?

A. I little choppy, yes, sir.

Q. What time did you leave the Samoa side?

A. I forget; I think it was five o'clock. We were quitting work about five, I think so, we were only working nine hours; that is the way I understand [171] it.

Q. The time is fixed here by every officer of the boat as 5:30; would you say that they are approximately correct? A. 5:30?

Q. Yes, was it not about 5:30 that you left the Samoa side?

A. I do not understand that. We were working nine hours, and we left at five; if we were working ten hours we leave at six.

Q. I will pass that question for the present. Were you riding on the lower deck? A. Yes, sir.

Q. Were the lights lit on the boat at the time the accident happened?

A. I don't remember whether they were lit or not.

Q. You have no recollection as to whether it was light or dark at that time?

A. Daylight or darkness; just between daylight and darkness.

Q. Just growing dusk? A. Yes, sir.

Q. Would it not be rather difficult to see a man in the bay, if it was growing dusk, with the bad condition of the bay?

A. I could see him quite a distance; I could see the life-preservers plain.

(Testimony of James Mason.)

Q. You could see the life-preservers?

A. Yes, sir.

Q. But you could not see him? A. No, sir.

Q. When you got to the upper deck, did you find the upper deck passengers watching for him or looking for him?

A. I found some of them there throwing life-preservers.

Q. Were they looking at the man?

A. They were, some of them were throwing life-preservers, and they were watching to see if they could see him. I never heard anyone say they saw him.

Q. Did anyone see him out there at all?

A. I do not know; I cannot tell you that.

Q. You say sometimes you have seen the door closed and the bar up?

A. It was closed and the bar in, yes, sir. [172]

Q. You have worked there for eleven years?

A. Yes, sir; I think, last March.

Q. Was that the usual condition, for the door to be closed and the bar up during those eleven years?

A. I have seen it up. I never seen both the door open and the bar off; to my knowledge, this was the only night.

Q. This was the only night that you saw the door open and the bar down?

Mr. COONAN.—He has seen the door closed and the bar down.

Mr. DICKSON.—Q. This is the only time in eleven years that you have seen the door open and

(Testimony of James Mason.)

the bar down? A. I didn't say that.

Q. You said that you had never seen both the door open and the bar down.

A. I said I never seen it.

Q. At any time?

A. No, not to my knowledge.

Q. You say that the boys persistently opened that door?

A. I guess they did pretty near every night; they do it yet, too.

Q. The ones who opened that door were usually the young fellows who sat around near to it?

A. Generally.

Q. They were all young fellows?

A. Mostly all young fellows.

Q. How many were there in the bunch of young fellows that would sit around that boat, and take a hand in opening the door?

A. Sometimes there were not very many, and at other times there were lots of them.

Q. At this time?

A. Quite a lot of them at that time.

Q. I mean young fellows that had nothing to do with the opening and closing of the door?

A. Generally the ones that are right near the door.

Q. How many were there in that bunch, something like 6 or 8?

A. Yes, sir; more than thirty or forty. [173]

Q. Sitting around close to that door, they would take a hand in opening it? A. Yes, sir.

Q. Do you mean, forty on the lower deck?

(Testimony of James Mason.)

A. I guess there are 100 sometimes, pretty near, when it is cold weather.

Q. That was not used as much by the passengers as the upper deck?

A. In cold weather it was.

Q. When the boat was running on her run, all those passengers on the lower deck would usually go out the cargo-port door? A. Yes, sir.

Q. You said that when it came to opening that door and getting off, you were as bad as the rest of them? A. Yes, sir; I generally was.

Q. In other words, you would give a hand on the door if he became hot?

A. It was very seldom I was up that close to the door; they would have it opened by the time I got there.

Q. You do not mean by that that there was a man stationed there to keep you from opening that door, that you would use physical force to the officer or men on the boat?

A. No, I think I have better sense than that.

Q. Did you ever see anyone on that boat use physical force to push aside or do away with the man who was stationed there to guard it?

A. No, I never seen them force it away. I have heard them sass them lots of time, talk back to them.

Q. Whose post of duty was it to be stationed there at that bar to see that they did not take it down?

A. I do not know that; I do not know the rules of the ship, I do not know who was supposed to do that.

(Testimony of James Mason.)

Q. And it was not very often there was anybody there, was it?

A. Once in a while there would be.

Q. They were not stationed there regularly?

A. No, sir. [174]

Q. So a greater part of the time the boys there would open and close that door as they saw fit?

A. Yes, sir.

Q. Did the boys as a rule take the bar down before the boat got to the landing?

A. Yes, sir; they did lots of times.

Q. Within a few weeks prior to this accident, were they then taking the bar down themselves?

A. Yes, sir; and yet too.

Q. Still take it down? A. Yes, sir.

Q. Anybody stationed there?

A. No, nobody stationed there.

Q. No precautions are taken at all?

Mr. COONAN.—I object to that question as referring to the present time.

The COURT.—Objection sustained.

Mr. DICKSON—Q. You say in the morning that Nick usually put up the bar?

A. Yes, sir; he generally does, because he was there first. There was other people there before Nick.

Q. If Nick happened to be there first he did it?

A. Nick was always there first, but there were other men there, too; Nick was not always upon that boat.

Q. How long has Nick been upon that boat?

(Testimony of James Mason.)

A. I cannot say that, three or four years; he was second mate before he got to be first mate; sometimes they call it No. 1 and No. 2 deck-hands.

Q. They are not really mates, they have not mates' papers?

A. No, but we generally call them first and second mates.

Q. On the other side, leaving the Samoa side, I suppose the same rule prevailed, that the first one that happened to be there would put up the bar?

A. Coming this way,—we do not see the boat when she goes the other way—the boat is always there when we come down, and lots of times the door is shut; then we have got to go on deck and go downstairs. If the door is open, the bar is generally in, and we go over the bar; some of the young fellows go over it. I go under it. [175]

Q. The bar is generally in at that time?

A. Yes, sir.

Q. Would Nick be stationed there while you go in under the bar on the Samoa side?

A. Nick is taking tickets.

Q. Up on the other deck?

A. He stands over the end of the gang-plank.

Q. On this particular night, the 15th of January, 1915, who was taking tickets?

A. I guess that man there was. I do not know his name, Mr. Knudsen, that man over there.

Q. He is the other deck-hand? A. Yes, sir.

Mr. COONAN.—That is Mr. Knudsen

Mr. DICKSON.—That is the other deck-hand?

A. Yes, sir.

(Testimony of James Mason.)

Redirect Examination.

Mr. COONAN.—Q. Mr. Mason, on going onto the boat from the Samoa side, have you seen that cargo-port door closed and no bar up. I mean from the outside of the boat, as you are going on board the boat, from the Samoa side?

A. I think I have, if the door was closed.

Q. And there was no bar up? A. Yes, sir.

Q. You do not intend to state in your testimony, do you, that upon those evenings the bar was not up and the door was open?

Mr. DICKSON.—I object to his asking him as to what he intended to state. If he wants to ask him what the facts were, all right.

The COURT.—His testimony is quite clear. He says he never saw the door open and the bar not up.

The WITNESS.—You mean to say I said that the door was open and the bar not up?

Mr. DICKSON.—Q. You say that you have on the Samoa side observed that door closed and the bar not up?

A. Yes, sir; that is what I said.

Q. When did you see that?

A. It is pretty hard to say that. I did not keep any days or dates about that; I have other things to trouble me. [176]

Q. It may have been a long time ago?

A. Yes, sir.

Q. You traveled on that boat when there was no bar at all? A. Yes, sir.

Q. You traveled on that boat when they had noth-

(Testimony of James Mason.)

ing but a chain on it? A. Yes, sir.

Q. You remember when they were forced to use a door instead of a chain?

A. I don't know; Captain Coggeshall was the first man who ever put that bar in.

Q. He changed from chains to the bar?

A. Yes, sir.

Q. On the Samoa side when the door was closed you, of course, would board the boat on the middle deck? A. From the upper gang-plank.

Q. There was nothing on those occasions that would call your attention to the bar?

A. No, sir.

Q. As to when you observed that door closed and the bar up, you could not say when it was?

A. No, sir.

Q. It may have been a long time ago?

A. I generally wait on this side whether the bar is in or not, until they open the door. If I happen to be up and around and in an argument, I do not pay attention to that every night.

Mr. DICKSON.—That is all.

Testimony of E. J. Weber, for Petitioner.

E. J. WEBER, called for the petitioner, sworn.

Mr. COONAN.—Q. Where do you live?

A. Here in Eureka

Q Where are you employed?

A. With the Hammond Lumber Company.

Q. How long have you been employed with the Hammond Lumber Company?

A. Twenty-two years in that plant.

(Testimony of E. J. Weber.)

Q. During the last 5 or 6 years have you gone to your work and come from your work on the steamer "Antelope"? A. Regularly.

Q. Upon the evening of this accident, the 15th day of January, 1915, were you on the steamer "Antelope"? A. I was. [177]

Q. Do you remember the accident?

A. Yes, sir.

Q. Where were you?

A. I was on the middle deck, about midway of the ship.

Q. That is the deck above the lower deck?

A. Yes.

Q. Did you see Early strike the water?

A. No, sir; I did not see him strike the water; I was standing up, leaning against the rail; I heard the splash; I looked over and seen him in the water.

Q. What did you do after you saw him in the water?

A. I was afraid he was getting in the wheel; I kept watch of him until he was clear of the wheel; then I ran to the pilot-house.

Q. What did you say to the captain?

A. When I got around to the entrance of the upper deck I could see him there, and I hollered to him, "Man overboard," and he echoed back, "Man overboard."

Q. Did he stop the ship? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. Did he reverse the engines? A. Yes, sir.

(Testimony of E. J. Weber.)

Q. Did you proceed back to the place of the accident?

A. No, sir; I walked back on this upper deck to the wall that is next to the wheel; I looked over to see whether I could see him.

Q. You did that? A. Yes, sir.

Q. Could you see him at that time?

A. My eye got an object on the water; I watched it, but it turned out to be something else; I supposed it to be a life-preserver.

Q. How much time elapsed from the time that you saw the boy in the water until you went back near the wheel and looked for him again?

A. It could not be over 3 minutes, at the outside.

Q. You were not able to see the man in the water at that time? A. No, sir.

Q. Was the light sufficient to have seen him if he was above the water? A. Oh, yes.

Q. Where did you usually travel upon the "Antelope" coming from [178] Samoa?

A. On the upper deck usually, on the middle deck; it is really the middle deck.

Q. Did you frequently travel on the lower deck?

A. Not very often, sometimes; awhile back the running bridge was out of commission and I would go below because it was hard to get off.

Q. Did you ever see the men crowd the cargo-port door and open that door? A. Oh, yes.

Q. Have you heard members of the crew tell them not to do that? A. Yes, sir; many times.

Q. Did they disregard that warning?

(Testimony of E. J. Weber.)

A. When the gangway was out of commission on this side, when the tide was very low, or very high, I mean, there was no plank; the first deck-hand would go down there; he would go down there and lean over these cargo-port doors. They would go after him for not letting them out but he never would. I have seen them go under it.

Q. He could not prevent them from going over it?

A. They were like a bunch of rats.

Q. Have you ever seen the men go over the side of the upper deck? A. Yes, sir.

Q. Did these men usually have nails in their shoes?

A. I don't know.

Q. They climbed right over the upper rail?

A. Yes, sir.

Q. And did they go ashore?

A. Yes, sir; jumped.

Q. Jumped from the upper rail; is that correct?

A. Correct.

Q. At the time you saw the boy in the water, how was he dressed?

A. He had a big slouch coat on; outside of that I don't know.

Q. Would you say that the overcoat was heavy?

A. I would say that it was a pretty heavy coat; it was kind of a long ulster, and it came pretty well down to the ground; whether it was heavy material or not, I do not know.

Q. After the captain stopped the ship he backed the ship didn't he? [179]

A. Yes, sir.

(Testimony of E. J. Weber.)

Q. Did he go to the place where the accident had occurred?

A. As near as I could measure he did.

Q. How long did the captain stay around there?

A. I could not say just how long because I never timed it. I know I was a half an hour late getting home; I missed two street cars.

Cross-examination.

Mr. DICKSON.—Q. You were on the middle deck? A. I was.

Q. Did you see any small boat lowered?

A. No, sir.

Q. Did you see any attempt to lower any small boat?

A. No, sir; in fact, I did not look.

Q. Other than the throwing over of the life-preservers, did you observe any attempt to rescue the boy after he was in the water?

A. No; I did not see any life-preservers thrown either, although I saw them in the water; supposedly life-preservers.

Q. When you saw this boy in the water after you went back, you were in the back part of the boat,—you say you thought it was a life-preserver.

Q. It was rather hard to distinguish what it was?

A. Yes, sir; it was hard to tell what it was.

Q. Was the sea choppy at that time?

A. Not very; just a little wind up.

Q. It was just growing dusk, was it not?

A. Yes, sir; sundown.

Q. So it would be rather hard to distinguish a

(Testimony of E. J. Weber.)

small object at any very great distance in the water?

A. To tell distinctly what it was, it would be.

Q. You thought afterwards this object might be a life-preserver?

A. I see it drift up against the Occidental dam; I watched it.

Q. When you first caught sight of it, it was hard to distinguish what it was?

A. It was pretty hard to distinguish whether it was a life-preserver or a coat; it looked something like a life-preserver, [180] or some coat drifting on the water; I concluded it was a life-preserver.

Q. At about what distance were you looking at that object?

A. The distance of a city block; 300 feet or so.

Q. How long did it take the captain to bring that boat to a standstill, after he got the notification that there was a man overboard?

A. That would be only my opinion; you might have just as good an opinion as me on that.

Q. Can you give us any idea of the distance she ran before she was stopped?

A. It would not be long; from the experience I have had around it would not be necessary to run over the length of a block or so before she came to a standstill; the wind was strong against her or practically against her, in the west.

Q. That was after you had given the alarm?

A. Yes, sir.

Q. You watched the boy until he got clear of the wheel? A. Yes, sir.

(Testimony of E. J. Weber.)

Q. You mean by that, that he did not get in it?

A. He did not get in under.

Q. You are sure he was not struck by the wheel?

A. No, he was not struck by the wheel.

Q. He was still struggling in the water the last time you saw him? A. Yes, sir.

Q. Your notification to the captain was the first he had received?

A. I presume so, because he paid strict attention to it.

Q. There had been no efforts to stop the boat prior to that time? A. I don't think so.

Q. Do you know whether or not there was a speaking-pipe from the engineer's room up to the captain's?

A. I don't know; but I could hear—when I called to him—immediately I could hear the wires rattling from the pilot-house.

Q. You say you have seen the boys open and close that door repeatedly? [181]

A. Not this boy exactly; I have seen the crowd do it.

Q. That was a usual thing?

A. Yes, that was a usual thing.

Q. Night after night? A. Yes, sir.

Q. What effort was made to stop them from doing that?

A. I don't know as I ever see any effort made to stop it; only at the time the passengers were going out at the lower deck.

Q. That was after they got to the landing?

(Testimony of E. J. Weber.)

A. Yes, sir.

Q. You never saw any effort to stop them from opening that door out at the bay when the whistle blew? No, sir.

Q. The whistle usually blew about opposite the Occidental Mill?

A. Each captain has his own location about blowing whistles; this captain generally blew about D or E streets; but sometimes before we got up to E Street; most of them generally blow opposite the Occidental Mill.

Q. That is the time the boys would open this door?

A. Sometimes; and sometimes they would open it before.

Q. You never saw any objection offered to that practice, did you,—to the boys opening the door out there? A. No, not as I remember.

Q. What you did see objected to was going under or over the bar at the landing?

A. Well, before she landed.

Q. Just before she landed?

A. Yes, sir. I used to see the crew or man in charge object to taking this bar out before the ship was in.

Q. They did not seem to regard the opening of the door as an important matter?

Mr. COONAN.—That question is objected to as calling for the conclusion of the witness.

The COURT.—Sustained. [182]

Redirect Examination.

Mr. COONAN.—Q. If I understand you correctly,

(Testimony of E. J. Weber.)

you saw only one object upon the water after the accident? A. That is all.

Q. You did not know what that object was first?

A. It struck me that it was still him on the water, but I watched until I was sure it was no man.

Q. Did you state that it went up against the Occidental dam?

A. Yes, sir; but I could not see it any more.

Q. You said that different captains blew the whistle for landing at different places?

A. Yes, sir; at little different places.

Q. This captain blew the whistle between D and E streets? A. As a general rule; yes, sir.

Testimony of Nick Muster, for Petitioner.

NICK MUSTER, called for the petitioner, sworn.

Mr. COONAN.—Q. Where were you employed in January, 1915?

A. For the Coggeshall Launch Company.

Q. What boat were you on?

A. On the "Antelope."

Q. What was your position?

A. My position was to collect the tickets and to look out for the gang-planks.

Q. What was your position known as?

A. No. 1 deck-hand.

Q. Were you No. 1 deck-hand? A. Yes, sir.

Q. On the 15th day of January, 1915, were you upon the boat?

A. No, sir; I was in the hospital.

Q. Did you notify Captain Coggeshall that you

(Testimony of Nick Muster.)

would not be upon the boat upon that day?

A. I asked Krohnie to get away; I did not ask Captain Coggeshall to go out of the boat.

Q. If I understand you, you did ask Captain Krohnie if you could get away from the boat, but you did not ask Captain Coggeshall? A. No, sir.

Q. What were your duties as first deck-hand?

A. What my duty [183] is? Look out for the gang-planks, on the main deck.

Q. Were you ever No. 2 deck-hand?

A. Yes, sir.

Q. When were you No. 2 deck-hand—what were your duties when you were No. 2 deck-hand?

A. To go down on the lower deck and close the door.

Q. After you closed the door, what were your duties A. Come up and let go my stern line.

Q. When you were second deck-hand, were you given any instructions concerning this cargo-port door? A. Yes, sir.

Q. What were your instructions? Were your instructions in regard to the door, itself?

A. I have a cross-bar there besides the door; if you mean that.

Q. Did you receive any instructions to keep the opening closed?

Mr. DICKSON.—I object to the form of the question, as leading; he can let the witness tell what his duties were.

The COURT.—The objection is sustained.

Mr. COONAN.—Q. Can you state what your

(Testimony of Nick Muster.)

duties were in regard to that door, when you were second deck-hand?

A. My duties were to close the door.

Q. Suppose it was a nice day?

A. If it was a nice day, I put the bar across.

Q. Did you ever receive any instructions to put the bar up and close the door at one and the same time?

A. No; sometimes I would put up the bar, and sometimes I would close the door; sometimes I opened the door and put up the bar.

Q. As second deck-hand, did you ever have any trouble? A. Never.

Mr. DICKSON.—I think that question is leading.

The COURT.—The objection is sustained.

Mr. COONAN.—Q. As second deck-hand, did you ever warn the men not to touch the door and the bar?

Mr. DICKSON.—I object to the form of the question as leading.

The COURT.—The objection is overruled. [184]

Mr. DICKSON.—Exception.

A. A hundred times.

Q. Did they observe the warnings that you gave them? A. Them boys will not listen to me.

Q. They will not? A. No, sir.

Q. As first deck-hand have you ever given any instructions to the men in regard to opening that door?

A. I see the men take down the bar before we got alongside of the wharf.

Q. Did they disregard those instructions?

A. They won't do it.

(Testimony of Nick Muster.)

Q. Have you ever given instructions to the boys and the men about climbing over the upper railing?

A. I talked to them so many times on the boat; but a man cannot stop them.

Cross-examination.

Mr. DICKSON.—Q. Nick, how long have you been employed by Coggeshall?

A. I am employed five years; \$25 a month.

Q. Are you employed by him now?

A. I am working in the same place now.

Q. Right in the same place to-day?

A. Yes, sir.

Q. You have been sick a good deal recently, haven't you? A. I was sick, yes.

Q. You have been in the hospital lately?

A. It is two weeks, now.

Q. It was since the accident?

A. It was before the accident, and then I was in the hospital at that time.

Q. When you are in the hospital your time goes right on just the same?

A. Captain Coggeshall, he pay me right along.

Q. He has been very good to you?

A. So he do.

Q. At this time, of the happening of this accident, you say you were in the hospital: Was that the first time you went in the hospital since you have been in Coggeshall's employ?

A. That is the first time. [185]

Q. How long were you in the hospital at that time?

(Testimony of Nick Muster.)

A. I was exactly two weeks, fourteen days.

Q. Your time went right along just the same?

A. Yes, sir.

Q. When did you go into the hospital?

A. The 9th of January, I guess.

Q. And you were there two weeks?

A. Yes, sir.

Q. Then you must have come out the 23d or 24th of January? A. The 23d.

Q. Did Coggeshall know when you came out the hospital?

A. Coggeshall, he know after I came to the hospital, because I saw him before; I told him another couple of weeks.

Q. Did your time go along then? A. Yes, sir.

Q. Coggeshall knew all about that, did he?

A. He knew I was sick, as far as I know.

Q. Were you sick for a time, even when you were around about your work, before you went to the hospital? You were not feeling well before you went, were you?

A. I guess I was sick before that.

Q. Did Captain Coggeshall know you had been sick before that?

A. Coggeshall, I never spoke to him; I spoke to Captain Krohnie about it.

Q. You spoke to Captain Krohnie?

A. Yes, sir.

Q. Then Coggeshall knew it?

Mr. COONAN.—I object to that. He said he told

(Testimony of Nick Muster.)

Captain Krohnie, he did not tell Captain Coggeshall.

The COURT.—The objection is overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. Captain Coggeshall knew, did he not, that you were sick?

A. Coggeshall, I don't know whether he knew if I were sick or not; I did not ask Captain Coggeshall to go to the hospital. I ask Captain Krohnie; that is my boss.

Q. When did Coggeshall first find out that you had been in the [186] hospital?

A. Indeed, I could not tell about that.

Q. Could not tell about that? A. No.

Q. You never sent any word to him while you were in there?

A. After I came to the hospital, I guess it was, that would be four or five days after, I came from the hospital; I was down to the boat.

Q. That is the first Coggeshall knew that you had been in the hospital?

A. I talked with him. He asked me how I get along. I said I am no better. I do not know whether he knew before that.

Q. He knew that you had been sick?

A. Yes, sir.

Mr. COONAN.—I concede that he knew it that night he returned, that the man was sick.

The COURT.—He found it out the night of the accident, so the knowledge that he had after he came from the hospital is not of much importance.

(Testimony of Nick Muster.)

Mr. DICKSON.—Q. Did you know, Nick, after you went into the hospital, that your time was going to run along just the same?

A. I did not know nothing about that.

Q. When did you find that out?

A. I find that out when I draw my check.

Q. It was your duty as a No. 1 deck-hand on the Samoa side to look after the gang-plank?

A. For the tickets and gang-plank.

Q. When you were not there, who looked out for the tickets?

A. If I am not there, No. 2 deck-hand.

Q. He looked out for the tickets?

A. Yes, sir; if I am not there.

Q. When you were not there, you say it was the duty of No. 2 deck-hand to close the door and put the bar up?

A. If I close the door, there was no use to put the bar up.

Q. If you close the door, there was no use to put up the bar? A. No, sir.

Q. So when you went down there and closed the door, you would not put up the bar?

A. No, sir. [187]

Q. If you left the door open you always put up the bar?

A. If the door is open, put up the bar.

Q. Have you ever closed the door and put up the bar, too?

A. That happens sometimes; a very few times in a year.

(Testimony of Nick Muster.)

Q. When you closed that door, you would not put up that bar but a few times in a year?

A. There is no use to put in both; when the door is closed, the bar is down; when the door is open the bar is up.

Q. You say the boys were in the habit of opening that door before they got over?

A. Them people pretty near did it all the time.

Q. And you could not stop them?

A. I could not stop them, no.

Q. You knew, before you left the Samoa side, that the door was always sure to be opened by the boys before they got to the Eureka side?

A. If the door is closed.

Q. You knew that before you left the Samoa side?

A. If the door has been closed.

Q. You knew that the door was almost sure to be opened by the boys before they got to the Eureka landing? A. They did that.

Q. You knew it?

A. I knew, because I see.

Q. You saw that they did it night after night?

A. Very nearly every night.

Q. And you would close the door and leave the bar down?

A. We closed the door and left the bar down; sometimes we get the bar up; sometimes we close the door and sometimes we put only the bar in its place.

Q. When was it that you became No. 1 deck-hand?

A. That came quite a long time ago.

(Testimony of Nick Muster.)

Q. About when?

A. Three years ago last March.

Q. Three years ago last March? A. Yes, sir.

Q. After you became No. 1 deck-hand, you did not then have anything more to do about the bar and the door?

A. No, No. 2 deck-hand [188] has got to do that.

Q. No. 2 deck-hand has that to do?

A. Yes, sir.

Q. After you became No. 1, you did not try to keep the boys from opening the door?

A. I sing out from the upper deck; that is the only way.

Q. That is the only way?

A. Because I could not go down to the lower deck.

Q. You could not go down there then and stop them? A. No, sir.

Q. What boys did you ever tell not to open that door, after you became deck-hand No. 1? Give us the names of a few of them.

A. I cannot name any of them.

Q. You can't name any of them?

A. No; people change; maybe I knows his name for a few days, then after that I forget it.

Q. When you had this trouble with the boys about the door and the bar, was that when you were No. 1 or No. 2 deck-hand?

A. It was at the time I was No. 2 and at the time I was No. 1. When I was No. 1 I sang out from the upper deck; at that time they wanted to take the bar

(Testimony of Nick Muster.)

out or open the door.

Q. Just tell us what kind of trouble you had.

A. No trouble at all; just to stop it.

Q. No trouble at all? A. No, sir.

Q. You just told them to stop it? A. Yes, sir.

Q. Nick, when you found out that the boys would not pay any attention about opening that door, did you keep on telling them night after night?

A. I would tell them right along.

Q. All the time that you were No. 1 and No. 2, you kept telling these boys not to open that door?

A. Yes, sir.

Q. Every night? A. Yes, sir.

Q. Regardless of the fact that they would not pay any attention?

A. They would not pay any attention, that is one sure thing. Sometimes I got a bucket of water from the *make* deck to make them [189] stay in.

Q. You kept telling them every night?

A. Yes, sir.

Q. Nick, have you been talking over this question with Captain Coggeshall, or his attorney, within the last few days? A. No, sir.

Q. Haven't they mentioned the subject to you?

A. The first thing this morning Captain Coggeshall, he came on board and said, "You got to go to court"; that is the first thing I knew about it.

Q. Nothing mentioned before this morning?

A. Nothing; no.

Q. Did he intimate to you this morning what your line of testimony was to be?

(Testimony of Nick Muster.)

A. He told me nothing at all.

Q. He told you nothing at all? A. No, sir.

Q. You feel very friendly to Captain Coggeshall; the captain has been very kind to you, hasn't he?

A. Captain Coggeshall is a good man to me, and I try to do my duty at the same time.

Redirect Examination.

Mr. COONAN.—Q. Mr. Muster, did I ever discuss this case with you prior to this morning?

A. No, sir.

Q. I did not know you before this morning—how long did I discuss this case with you this morning?

A. Two minutes, a minute and a half.

Q. Mr. Muster, I want to ask you if prior to this sickness of Janaury, 1915, if you did not hurt your foot at one time; do you remember of hurting your foot?

A. Yes, sir; I remember that; that was this year.

Q. It was prior to that date? A. No, sir.

Q. When you hurt your foot, did your time go on?

A. You bet you.

Q. At the other times when you were in the hospital, did your time go on?

A. I got my time then.

Q. In regard to what you did to prevent the men from getting off the boat on the lower deck, I will ask you if you ever chained that door?

A. We chained the door, with Captain Johnson, that [190] was the first time; then he locked the door. We chained the door and the first thing they broke the chain.

(Testimony of Nick Muster.)

Q. And the second time?

A. The second time was with Krohnie.

Q. What happened?

A. They broke the chain to open the door.

Q. Suppose the bar was up when you arrived over at Samoa, and it was a cold day, and you closed the door, would you also take the trouble to remove that bar before you closed the door?

A. No use to move it, because the bar is outside of the door.

Q. If the bar was outside of the door, you would close the door and you would not remove the bar: Is that correct?

A. Sometimes I might do that; sometimes not.

Q. Sometimes you would move the bar?

A. Yes, sir.

Q. (Mr. DICKSON.) Sometimes the bar was up and the door closed?

A. Yes, sir; on a cold day.

Q. Nick, when the boys broke these chains, did you put on stronger chains after that?

A. No, sir; the time they broke the chain,—next time they would break the ship.

Q. You thought there was no chain that would hold them? A. No, I don't think so.

Testimony of John R. Jacobson, for Petitioner.

JOHN R. JACOBSON, called for the petitioner, sworn.

Mr. COONAN.—Q. What is your name?

A. John R. Jacobson.

Q. Where do you reside? A. Eureka.

(Testimony of John R. Jacobson.)

Q. By whom are you employed?

A. By Captain Coggeshall.

Q. How long have you been employed by Captain Coggeshall? A. Three and one-half years.

Q. Were you employed by him on the 15th day of January, 1915? A. Yes, sir.

Q. In what capacity? A. Engineer.

Q. Engineer of what?

A. Of the steamer "Antelope."

Q. Were you present when the accident occurred whereby Early lost [191] his life?

A. I was right at my post.

Q. State what happened.

A. We got around the bend a little ways, and I heard a shout, "Man overboard"; but I did not pay much attention to it, because I have heard that often. I looked out toward between-decks, and I seen them pulling the life-preservers down. When I seen that, I shut off my steam, so that she would not take full headway. I made about two steps to see whether that door was open, or whether he fell from the upper deck. I took about four steps when I got a signal to slow down, and shortly after that to stop, so I remained right there.

Q. Do you mean that after you heard the shout by someone that you received a signal from the captain?

A. Yes, sir.

Q. Was that the reason you waited for a signal?

A. Yes, sir.

Q. Did you know an accident had occurred?

A. I knew that there was a man overboard.

(Testimony of John R. Jacobson.)

Q. By the shout of someone. Did you slow down the speed of the vessel?

A. Very little, yes; some, yes.

Q. Do you know what the tide was? A. Ebb.

Q. What is known as ebb tide? A. Yes, sir.

Q. Do you know what the character of the wind was? A. A very strong head wind.

Q. In what distance do you say the boat stopped?

A. She stopped in 120 feet, 100 feet.

Q. How long a time do you think it took you to stop the boat?

A. It took me about one minute to stop the boat.

Q. Did you reverse the engines also?

A. As soon as I got the signal from the captain, yes, sir.

Q. How long was it before you received the signal to reverse the engine?

A. Probably 45 seconds to a minute, somewhere around that.

Q. What did you do then?

A. I reversed my engines. [192]

Q. What did the captain do with the ship, as far as you could observe?

A. What I observed, when the engine was stopped, was slowed down, he starboarded his helm; as soon as he had a little headway he continued with the starboard helm, then he moved his helm over to port, and backed her.

Q. In what position did this throw the boat?

A. It threw the boat around to the north, to the westerly.

(Testimony of John R. Jacobson.)

Q. The bow of the boat was heading to the westward of north?

A. No, when we slowed down I was heading from westward, then she swung to the north.

Q. Did you remain about the point of the accident? A. Yes, sir; pretty much.

Q. How long did you remain there?

A. Fom the time we slowed down until we got under headway against, it must have been not less than ten minutes, in that neighborhood, probably; I could not state exactly.

Q. Have you ever heard the deck-hand tell the men not to go out through the cargo-port door?

A. Yes, sir.

Q. Did they observe those instructions?

A. Nothing doing.

Q. Do you know how often that door is closed?

A. No, I know it is closed mostly every morning, but in the evening it is very seldom ever closed.

Q. It is usually open?

A. It is usually open in the evening.

Q. Did you look out to the place of the accident?

A. No, sir.

Q. Did you see anything floating by you on the water?

A. I seen some life-preservers floating up.

Q. Did you see the body of George D. Early at all?

A. No, sir.

Q. After you arrived at the dock, did you go up onto the Texas deck, where the captain is?

A. I would not be sure.

(Testimony of John R. Jacobson.)

Q. Did you see life-boats up there?

A. Yes, sir; the port life-boat [193] had been swung out and remained out until we came on deck. I was asked to come up and give him a hand—I do not remember by whom,—so I went up to help him.

Q. From your observation, was it in a condition to be lowered at that time? A. Yes, sir.

Cross-examination.

Mr. DICKSON.—Q. You remained at your post of duty all the time?

A. Yes, sir.

Q. The captain remained at his post of duty in the wheel-house?

A. I could not see the captain; I do not know.

Q. Have you any speaking tube connecting between the engineer's post and the captain's post in the wheelhouse? A. Yes, sir.

Q. Were you not in conversation with the captain?

A. Not at all.

Q. Then you did not give the captain notice through the speaking-tube as soon as this outcry was raised? A. No, I did not have time, because I had to slow the ship up.

Q. But the captain, he afterwards signaled back to you to stop the boat through this speaking-tube?

A. No, only by the bells.

Q. He gave you the signal by the bells?

Q. Then the captain, when he gave the signal, must have been in his pilot-house?

A. He must have been; sometimes a man is not right up there, he might have another man there,

(Testimony of John R. Jacobson.)

but I don't know. He might have been on the other side of the ship.

Q. Besides you and the captain and the two deck-hands, what other officers or men were on the boat? That is, what was her complement of men?

A. There was a fireman, deck-hand, I think that was all.

Q. The fireman was down at his post of duty?

A. Yes, sir.

The COURT.—Q. The master, the engineer, the fireman and two deck-hands, that is the complement of the ship?

A. That is the complement of the crew.

Mr. DICKSON.—Q. How many men did it require to lower away those [194] life-boats?

A. Two men it requires; it requires two men.

Q. Did you see any life-boats lowered?

A. I did not see any life-boat lowered.

Q. Was there any indication that they had been lowered?

Mr. COONAN.—We do not claim that they were lowered.

The COURT.—I understand they were swung out.

Mr. DICKSON.—Q. One man could swing them out, could he not?

A. One man could swing them out.

Q. What can you say as to the condition of the light on that lower deck at the time the accident occurred?

A. The electric lights were burning between decks.

Q. The electric lights were on?

(Testimony of John R. Jacobson.)

A. Before we left Samoa they were on.

Q. It was getting dusk before you left Samoa?

A. No, it was good daylight; it was not necessary for no lights whatsoever to be burned on that night.

Q. That door was closed?

A. That door happened to be closed that night, so I put the lights on; it was not necessary for the navigation of the vessel.

Q. You put the lights on? A. Yes, sir.

Q. Did you put the lights on before you left the Samoa side? A. Yes, sir.

Q. You testified, did you not, at the coroner's inquest held over the death of the deceased, George Earley? A. Yes, sir.

Q. You were sworn at the time you testified, under oath? A. Yes, sir.

Q. I will ask you if this was your testimony given at that time: I will ask you first, if a transcript was taken of the testimony by a shorthand reporter?

A. There was someone there, I don't know.

Q. Was a shorthand reporter present at that time?

A. I did not [195] take any interest.

Mr. COONAN.—I will ask at this time that this witness be permitted to read the transcript, so that he may be permitted to answer the questions. I think they got his name as Albert Jacobson by mistake.

Mr. DICKSON.—Q. Referring to the testimony given by the person under the name of Henry R. Jacobson, is there a mistake in the name?

(Testimony of John R. Jacobson.)

The WITNESS.—That is all correct that I testified.

Q. You think that is the way you testified (handing transcript to witness).

A. I heard lots of things; people were putting it down there—the man was.

Q. What man are you referring to?

A. I did not hear anything in regard to the man going overboard. I was not asked anything about it.

Q. I will ask you if this was your testimony:

“Q. Tell us what you know about the condition of the boat when you left Samoa on the trip across?

A. We left Samoa, right before we left I put the lights on. I looked out in the lower deck where the passengers were and there was no light there, and I went out and the lamps were unscrewed, so I went around and screwed them up again, and told the boys, ‘You should not smoke in here,’ then when I came back again I said the same thing, and then I went to my engine and I never heard anything until I heard the bells to stop the engine—”

The WITNESS.—(Intg.) That is not what I said. I told the boys, “You cannot see to smoke”; that is what I said.

Q. (Reading:.) “We left Samoa, right before we left I put the lights on. I looked out in the lower deck where the passengers were and there was no light there, and I went out and the lamps were unscrewed, so I went around and screwed them up again, and told the [196] boys, ‘You should not smoke in there,’ then when I came back again I said

(Testimony of John R. Jacobson.)

the same thing, and then I went to my engine and I never heard anything until I heard the bells to stop the engine.” A. Yes, sir.

Q. That was when you told them it was too dark?

A. I says, “You cannot see to smoke.” Generally when I start the donkey, the lights start; but someone had turned them out, four of them were out; that was only about a minute after I started the donkey.

Q. Then up to the time you screwed those lights on, it was quite dark?

A. It was dark in between-decks.

Q. “Then when I came back again I said the same thing, and then I went to my engine.”

A. I must have heard lots of things; I certainly must have heard something.

Q. You are not sure at this time just what it was you heard, between the time of the accident and the time you got the signal from the captain?

A. No, I did not pay any attention; there was really no time then to listen to anything; I paid attention to my engine, to my duties.

Q. How long a time elapsed from the time you first knew of the accident until you got the signal from the captain? A. Not quite a minute.

Q. Is your recollection very clear on that?

A. Yes, sir. I can look out between-decks through the engine-room door. I got to make five steps to be able to see that door. When I first heard the cry of “Man overboard” the throttle was not open. When I seen them put down the life-preservers I

(Testimony of John R. Jacobson.)

swung the throttle open; then I went forward to see the view from the lower deck, but I did not have time to go back there and see whether the door was open or not; I got the signal and went right back, so I did not see the door. The people on the lower deck, what they were doing, I don't know. [197]

Mr. DICKSON.—That is all.

Testimony of Charles H. Smith, for Petitioner.

CHARLES H. SMITH, called for the petitioner, sworn.

Mr. COOK.—Q. By whom are you employed?

A. By the Coggeshall Launch Company.

Q. How long have you been employed by the Coggeshall Launch Company?

A. Since 1903, all except nine months, or a year.

Q. Prior to January 15, 1915, had you ever been laid up, or had you taken off holidays for any purpose, from the Coggeshall Launch Company?

A. Yes, sir.

Q. Had you ever been sick prior to January 15, 1915? A. I don't think I had.

Q. Did you ever lay off from the Coggeshall Launch Company prior to that time?

A. I might have, a day or so.

Q. Do you know whether you have laid off for a day or so? A. I might have.

Q. Do you know what the custom and practice is with the Coggeshall Launch Company in regard to payment of employees during the time that they are sick?

Mr. DICKSON.—That is objected to as irrelevant,

(Testimony of Charles H. Smith.)

incompetent and immaterial.

The COURT.—The objection is overruled.

Mr. DICKSON.—Exception.

A. The pay runs on just the same.

Mr. COONAN.—Q. Would that be true if you were taken to a hospital, also? A. Also.

Q. And if a man went to a wedding? A. Also.

Q. Or to a funeral? A. Also.

Q. In every one of these cases, his pay would run on? A. Just the same.

Q. This condition of affairs existed prior to January 15, 1915? [198]

A. As long as I have been there, I have never seen a man docked for them.

Cross-examination.

Mr. DICKSON.—Q. What position do you hold?

A. Captain of one of the boats.

Q. You say you have never been laid off sick?

A. Yes, sir; I have, between that time; yes sir.

Q. Who else in his employ have you known to be laid off sick?

A. Everybody gets sick once in a while.

Q. Give me the name of the person in his employ?

A. Mr. Lubert; he is one; there are four or five others there.

Q. Just name them; those who have laid off on the sick list? A. I cannot remember all of them.

Q. The only ones you remember are Lubert and yourself? A. Yes, sir.

Q. How long was Lubert laid off?

A. I cannot tell you. I do not think the man had

(Testimony of Charles H. Smith.)

been sick but a couple or three days since I was there.

Q. How much was Lubert paid, when he was sick?

A. I don't know anything about his pay.

Q. You don't know whether his time went on or did not? A. He never said anything to us.

Q. As a matter of fact, you do not know?

A. I know his pay goes on.

Q. Who told you that?

A. Lubert told me himself.

Q. Mr. Lubert had not said anything to you about it?

A. Of course he had said something to me about it.

Q. As I understand it, Mr. Lubert and yourself, are there any others of whom you had any knowledge of having laid off while in the employ of the Coggeshall Launch Company? A. That I cannot say.

Q. Lubert's time ran for two or three days while he was sick? [199]

A. I never heard anybody say anything about it; everybody's, as I far as I know.

Q. In other words, you never heard that subject discussed at all?

A. I am looking out for myself.

Q. Did you hear that subject discussed this morning? Did anyone discuss that with you this morning? A. No, sir.

Q. Has anyone discussed that with you during the last day or two? A. No, sir.

Q. You did not know what you were to be questioned on here when you were brought up here as a witness?

(Testimony of Charles H. Smith.)

A. No, sir; I was just told a few minutes ago that I should come up, a quarter past eleven.

Q. Did you know then what you were to be questioned about?

A. I did not know until I got on the stand.

Redirect Examination.

Mr. COONAN.—Q. You remember that you were married, Mr. Smith? A. Yes, sir; I do.

Q. How long were you away from the Coggeshall Launch Company?

A. Twenty-four hours, I guess.

Q. Did you take a vacation at that time?

A. A little while off.

Q. How long was that?

A. I was off a week.

Q. What year was that?

A. I think I have been married about five years.

Q. Did your pay run on?

A. My pay went on.

Q. Did you have a vacation every year?

A. I had a vacation any time I wanted it.

Q. Did your pay run on when you did receive a vacation? A. My pay ran on.

Q. Do you know a man by the name of Si Epps, who formerly worked for the Coggeshall Launch Company? A. Yes, sir.

Q. Do you remember when he got married?

A. Yes, sir.

Q. Did he take a vacation?

A. He took it.

(Testimony of Charles H. Smith.)

Q. Do you know whether or not his pay went on?
[200]

A. He told me his pay went on just the same.

Mr. DICKSON.—Q. You only know that he told you?

A. If a man tells me that it must be true; a man tells me his pay went on it must be so.

Mr. DICKSON.—I move that the testimony be stricken out on the ground of hearsay.

The COURT.—Let it go out.

**Testimony of Walter Coggeshall, for Petitioner
(Recalled).**

WALTER COGGESHALL, recalled.

Mr. COONAN.—Q. What is the policy of your company in regard to paying men when they are sick or upon a vacation, or an absence of whatever character it may be?

A. The policy of my company is that if a man is sick or has a legitimate reason for wishing to get away, like a death or a wedding, or anything that he wishes to get away for, I never have docked a man yet in my life, during my business career; I have been on this bay for 14 years, and I have yet my first man to dock for being absent from his duties.

Q. Then the payment of Nick Muster of his wages, in the month of January, 1915, when he was sick was not the first and only occasion?

A. No, it had been going on ever since I went in business. I have never docked a man yet for being absent from his duty.

Q. You said that in January, 1915, the dock of

(Testimony of Walter Coggeshall.)

the steamer "Antelope" was at G street?

A. Yes, sir.

Q. You said that the dock piles at the old dock were in the same position in regard to the wharf at G street as at the present one?

A. The same position but different in the character of the piles.

Q. What is the difference?

A. On the old dock, the piles were very much larger than the present piles; these are lighter. The old dock was built heavier, consequently it put the steamer further [201] away from the dock than she is in the present place; these piles set out further. Where the large plank goes down it makes two corners. Now, in the present dock there are no fender piles, at these corners. In the old dock there were fender piles probably 12 to 14 inches to protect them, consequently it got her further away from the gang-plank, some 12 to 14 inches than she is now,—the guard of the ship was that much further away.

Cross-examination.

Mr. DICKSON.—Q. You testified before the Coroner's inquest in this case, did you not?

A. Yes, sir.

Q. You testified under oath at that time?

A. Yes, sir; I suppose that I did.

Q. I will ask you if this is a portion of your testimony given at that time?

Mr. COONAN.—I will ask that the transcript be *present* to Captain Coggeshall so that he may re-

(Testimony of Walter Coggeshall.)

fresh his memory as to what he is going to be asked about.

Mr. DICKSON.—Q. Just referring you to that testimony (handing witness testimony).

A. That is my testimony, I swore to it, sir, under oath.

Q. That testimony was true?

A. To the best of my knowledge and belief.

Q. You testified at that time as follows:

“One of the Government laws of the Steamboat Inspection Service is, that if we have an opening in the side of the ship of any sort whatever, that opening must be protected in such a manner that there is no danger of passengers going overboard.”

Mr. COONAN.—That is objected to as not being cross-examination.

The COURT.—Objection overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. You so testified at that time, did you, captain?

A. That is part of my testimony; it is a little transcript of it, [202] but in answering that the full intent and meaning of the whole clause, I don't think is made plain.

Q. I will ask you if it is true that there is such a law of the Steamboat Inspection Service?

A. There is a law as understood by all steamboat men.

Mr. DICKSON.—Q. I will ask you what the law is.

Mr. COONAN.—I object to that upon the ground

(Testimony of Walter Coggeshall.)

that if there is such a law the law itself is the best evidence.

Mr. DICKSON.—He has testified that there is such a law.

The COURT.—He did not so testify in this court. We are not concerned with the testimony he gave in another case, insofar as it impeaches the testimony given here.

Mr. DICKSON.—Q. I will ask you, Captain, if there is such a law as that?

Mr. COONAN.—That is objected to, that the law itself is the best evidence.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. If I understand your testimony of yesterday, Captain, you stated that you were not obliged to put that bar across the door when the door was closed?

A. I repeat it, if you wish me to: That when the door is closed it is not necessary that there should be a bar across in front of that door; it is not necessary that there should be a bar across and in front of the door when the door is closed.

Q. Is that in conformity with your steamboat regulations?

Mr. COONAN.—That is objected to as calling for the conclusion of the witness as to what the steamboat regulations say.

The COURT.—I think we are wasting time on this question. The captain told us it was done because the Steamboat Inspectors gave him instructions to do so. If you are trying to show that that is not

(Testimony of Walter Coggeshall.)

true, then you may proceed, but if you are trying [203] to show that it is true, it has been established.

Mr. DICKSON.—I am trying to show that it is not true; that those instructions were not given.

The COURT.—Then if there is no law bearing on it, we can have it from the captain and in fact we are bound to do so.

Mr. DICKSON.—Q. I will ask you whether at the Coroner's inquest under oath you testified as follows: "We were obliged to put a bar across that opening"?

A. That is like a preacher, just a little text and there is nothing else with it; that is part of my general statement. I will look at it. I see that it is my statement.

Mr. COONAN.—If your Honor please, we are willing to submit that that was the testimony and we are willing counsel should introduce the whole of it and have it stipulated that if it is found impeaching evidence that it can be so considered by this Court, the whole of his testimony. That will save time and it will accomplish the result that he desires.

The COURT.—Counsel is not bound to introduce all of that testimony, but he introduces a portion of it. The respondent is entitled to introduce such portion of the remainder as explains or qualifies what may have been considered by counsel as impeaching.

Mr. DICKSON.—Q. You did testify that you were obliged to put a bar across the opening?

(Testimony of Walter Coggeshall.)

A. I so testified, if it is in writing there. I testified to everything on that paper. My name is sworn to it, and I will stand by it.

Q. It is a fact then that you were obliged to put a bar across that opening?

A. My instructions from the Federal Inspectors were, that here was this opening on the steamer "Antelope" and that when the opening existed, that is when we were to open that door, I must substitute the door with a bar. [204]

Q. Were your instructions to the effect that if an opening were there, you were required to have a bar across the opening?

A. That is just what I said to you, if you can understand English.

Testimony of Bernard Kelly, for Petitioner.

BERNARD KELLY, called for the petitioner, sworn.

Mr. COONAN.—Q. Captain Kelly, by whom are you employed at the present time?

A. By the Coggeshall Launch Company.

Q. How long have you been employed by the Coggeshall Launch Company?

A. A year ago the 6th of March.

Q. In what capacity are you employed?

A. Master of the steamer "Antelope."

Q. Have you master's papers for navigation of a vessel upon Humboldt Bay? A. Yes, sir.

Q. How much experience have you had upon the water? A. Thirty-eight years.

Q. Have you heard the testimony of the chief

(Testimony of Bernard Kelly.)

engineer Stephen Jacobson concerning how that boat was handled on the 15th day of January, 1915, after the accident? A. Yes, sir.

Q. In your estimation as a marine man and as a man who has handled the steamer "Antelope" over a period of one year, is it in your judgment a good way to have handled that boat?

Mr. DICKSON.—I object to the question because this witness has absolutely no knowledge as to how the boat was handled, on that occasion, and further, he is not able to give expert testimony as to whether it was properly handled or not.

Mr. COONAN.—Q. Suppose there was an ebb tide and a strong northwest wind, and the steamer "Antelope" had proceeded to about 300 feet north of the Occidental Dam, and a person had fallen overboard, and the captain signalled to slow down, then to stop, and while under headway he starboarded his helm, and he signalled to back, and he then ported his helm, would you say that that would be a correct way to handle the steamer "Antelope" under those circumstances [205] which I have before given?

Mr. DICKSON.—I object to the question upon the ground that it is not shown that the hypothetical conditions given in the question were such as existed at the time. There was considerable evidence *pro* and *con* as to what happened with the boat and what was done by the master after the alarm was given; and he is now asking this witness a hypothetical question based upon facts which have not been shown to exist.

(Testimony of Bernard Kelly.)

The COURT.—That is the testimony of the engineer. The objection is overruled.

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. Would you think that, under those conditions, the “Antelope” was handled correctly?

A. Yes, sir; I think she was. I think if anybody was coming up the bar and somebody fell overboard, the only thing that can be done, is to turn around. She will turn around quicker than she will back.

Q. As a matter of fact, if you step back can you see from the wheel-house immediately to the rear of the steamer “Antelope”?

A. I could see the rear, but I could not see anything in the water.

Q. Did you have to look a considerable distance from the ship to the water to see what there is in the water?

A. I could look over the rail and see on a parallel line of the ship, what is going on.

Q. If you put your helm to the starboard, is it not a fact that you could get a better view of the object that may be in the rear of the vessel than you could otherwise? A. Yes, sir.

Mr. DICKSON.—The question is objected to as leading.

The COURT.—Overruled.

Mr. COONAN.—Q. Since you have been in command of the boat have you [206] had any trouble in regard to the men there going through the cargo port door?

(Testimony of Bernard Kelly.)

Mr. DICKSON.—That has no bearing on this case; it relates to a time after this accident occurred.

The COURT.—If it is an accident in which a man lost his life it might throw some light upon it. The objection is overruled.

A. I never had any trouble with the men; it is just simply a matter that they do what they want to. They are all on that boat, and the bay is in such a condition,—sometimes they rush to one side and we can hardly handle the boat.

Q. Have you ever attempted to restrain them?

A. Yes, sir; I have often talked the matter over with these people, but they go there just the same.

Mr. DICKSON.—The same objection.

The COURT.—The same ruling.

Mr. DICKSON.—Exception.

Mr. COONAN.—Q. Did they go over the rail on the upper deck also?

Mr. DICKSON.—The same objection.

The COURT.—The same ruling.

A. Yes, sir.

Cross-examination.

Mr. DICKSON.—Q. You say that the “Antelope” will turn around quicker than she will back?

A. Yes, sir.

Q. In how much of a space would it require for the “Antelope” to make a turn, how far forward would she have to go before she would be able to turn completely around?

A. As she is going full speed ahead she will turn in about a length and a half of the “Antelope,” with a good swing.

(Testimony of Bernard Kelly.)

Q. In your opinion that should have been done in the case that counsel put to you, a few minutes ago, would be, to swing the "Antelope" around?

A. Yes, sir. [207]

Q. And not to back her?

A. She will come around a certain distance, and in a wind she will stop; you have got to reverse your helm and back her to get her further around.

Q. How far would the "Antelope" go, if a signal was given to stop her, how far would she go before she would come to a dead halt, how far would her momentum carry her forward?

Mr. COONAN.—That is objected to unless he states the other element. The engineer testified that he turned off the steam a short time before he received the signal, and it was ebb tide.

The COURT.—Q. In what length of time would he stop under ordinary conditions? The objection is overruled.

Mr. COONAN.—Exception.

Mr. DICKSON.—Q. What length of time would it require to stop her under ordinary conditions?

A. Is it calm or windy?

Q. The wind is calm.

A. In calm weather, with full speed, she would run possibly 200 feet; I never measured it; as a rule when I make a full stop, I will stop 200 feet from the dock.

Q. Would that be with the engines reversed?

A. The engine is not off, she is stopped.

Q. The engine is simply stopped?

(Testimony of Bernard Kelly.)

A. Yes, sir.

Q. She would go about 200 feet?

A. I figure she would; yes.

The COURT.—Q. Of course, against a head wind that would be less?

A. If there is any wind she won't go very far. Sometimes when we have enough wind she won't go at all. She is certainly a contrary thing to handle. I have seen all classes of vessels and she is the contrariest thing I have ever handled.

Mr. COONAN.—I move to strike out the answer.

Mr. DICKSON.—Q. What seemed to be the trouble with the boat in handling her?

A. There is nothing about her; I handle her; only she is not a good boat to handle. [208]

The COURT.—Q. She is all right, but she is hard to handle?

A. She is bad to handle. I have been in stern-wheel steamers before, but there is no keel on these boats and they slip around pretty lively.

Mr. DICKSON.—Q. Do you think the boat should have a keel on her?

Mr. COONAN.—I object unless it is first shown that the witness is a designer and constructor.

The COURT.—The objection is sustained.

Mr. DICKSON.—Q. You say that you have never had any trouble with these men?

A. Yes, sir; I have been down on the lower deck of a night and had a man upon that door at the Samoa side and tried to have them close it, and some

(Testimony of Bernard Kelly.)

of those fellows opened the door against my wishes on the Samoa side.

Q. What did you mean when you said a few minutes ago in response to Mr. Coonan's question that you never had any trouble with the men?

A. It depends on what trouble is; some men put the gloves on to have trouble; I do not believe in that; but there is lots of times I have talked to these men and had a good honest-to-God talk with them about listing the boat over. There is always room to give them advice there.

Q. That is about the extent to which you have gone, is to give them advice?

A. That is about enough as far as I know; except I take a club to them.

(A recess was here taken until 2 o'clock.) [209]

AFTERNOON SESSION.

Testimony of Andrew Knudsen, for Petitioner.

ANDREW KNUDSEN, called for the petitioner, sworn.

Mr. COONAN.—Q. On the 15th day of January, 1915, where were you employed?

A. By the Coggeshall Launch Company.

Q. In what capacity, what was your job?

A. Deck-hand.

Q. First or second deck-hand?

A. Second deck-hand.

Q. On what boat?

A. "Antelope," steamer "Antelope."

Q. How long had you been employed on the "Antelope" prior to that time? A. 18 months.

(Testimony of Andrew Knudsen.)

Q. Before being employed with the Coggeshall Launch Company with whom had you been employed?

A. The United States Life Service.

Q. For how many years?

A. 1892 to 6th of January, 1915,—the 1st of July.

Q. Had you been employed in the life saving service, since leaving the employ of Captain Coggeshall? A. Yes, sir.

Q. For how long?

A. Twenty-two days; the 1st of May to the 22d of May.

Q. What were your duties as second deck-hand?

A. I was ordered there to look after the line and look after the doors on the lower deck.

Q. What were your duties in regard to the door on the lower deck? A. To close it.

Q. What door do you refer to?

A. The door on the lower deck.

Q. The cargo-port door?

A. The cargo-port door.

Q. You state that it is your duty to close that door? A. Yes, sir.

Q. Have you any other duty in regard to that door?

A. I have to look out for the stern line, to make her fast, when the boat returns and when it leaves, to get in all the lines.

Q. Have you any duties in regard to any bar at that cargo-port door?

A. That depends. If I do not close that door I

(Testimony of Andrew Knudsen.)

put the [210] bar on; if I leave the bar down I close the door.

Q. When were you supposed to put the bar up?

A. Just before I left,—before everybody was aboard.

Q. Were you supposed to put the bar up on all occasions?

A. That all depends; sometimes I closed the door and left the bar out and sometimes I put the bar in and left the door open.

Q. If you had the door closed, did you have any duty to put the bar up? A. No, sir.

Q. Was the bar up sometimes when the *bar* was closed? A. Yes.

Q. Would the door be sometimes closed and the bar up?

A. Yes, sir; sometimes the bar was there and the people would close the door.

Q. Was the bar down and the door closed sometimes?

A. Yes, sir; the bar was down and the door closed.

Q. On the evening trip from Samoa on January 15, 1915, was the door open or closed?

A. The door was closed.

Q. Did you close it?

A. No, sir; I did not. A man closed it, that down there before.

Q. Did you see that it was closed?

A. I see that it was closed.

Q. From what position did you see that the door was closed?

(Testimony of Andrew Knudsen.)

A. I stood at the end of the gang-plank and took the tickets, and from there I could see that the door was closed.

Q. What kind of a wind was blowing that night?

A. A strong northwest breeze.

Q. What kind of a tide was it?

A. A strong night tide—ebb.

Q. Who gave you instructions about that door?

A. Captain Krohnie gave me instructions to always look out for those cargo doors, and be sure those cargo doors was closed when we left and had the passengers on board.

Q. Did he tell you to keep the bar up at all times?
[211]

A. To keep the bar up or have the door closed, when we had the passengers on the passenger trips.

Q. After you saw that the door was closed what did you do?

A. What I did then? I get the planks, the gang-planks, then I go to the captain and tell the captain it is all right.

Q. Did you go below? A. Yes, sir.

Q. Did you go below up to the time the accident occurred? A. No, sir.

Q. What were your next duties after leaving Samoa dock, running over to the Eureka side?

A. To make the boat fast and take in the gang-planks, for the people to walk there.

Q. Did you have any duties that would ordinarily take you down below? A. Nothing at all, sir.

Q. Have you ever instructed the men below not

(Testimony of Andrew Knudsen.)

to touch the bar of the door?

A. Very often, sir.

Q. Have they objected or disobeyed your instructions?

A. It did not make no difference. When they got up there they would take and open that door and put the bar down just the same.

Q. What was the first you knew of the accident?

A. The first thing they sang out, "A man overboard."

Q. What did you do?

A. I ran up to the captain to get the boat ready.

Q. After you got up where the captain was what did you do?

A. We got a boat ready and swung it out, ready for the occasion.

Q. How long did it take you to make the boat ready? A. About 4 or 5 minutes.

Q. Did you look to see whether the body of the boy could be seen at that time?

A. No, the captain was looking out for that; I took my place for the boat.

Q. Was he keeping his eye, looking to the point of the accident?

A. I did not look out to see if he could see him.
[212]

Q. Did the captain give you any orders to lower the boat?

A. No, sir, he could not see anything. The boat was ready.

Q. In your opinion, as a man who has been con-

(Testimony of Andrew Knudsen.)

nected with the life-saving service, would there be any reason why that boat should have been lowered under the circumstances as they then existed?

Mr. DICKSON.—I object to that as calling for the conclusion of the witness, and he is not an expert.

The COURT.—The objection is sustained.

Mr. COONAN.—Q. How much experience have you had since 1892 in saving people in the waters either from Humboldt Bay or waters of the Pacific Ocean?

A. A good many, upon the bay and up and down the coast.

Q. Have you gone out to wrecks?

A. Lots of them.

Q. Have you saved people from Humboldt Bay?

A. On the bar, yes, and all down the coast; saved the "Chelcut" and the "Wauwanette."

Q. Would you state from your experience in saving of lives that there was anything more to have been done after that boat was prepared for launching?

A. No, sir.

Q. If the man could not be seen—

Mr. DICKSON.—His knowledge as an expert and his experience in life-saving is entirely different; he has had no experience in the lowering of boats on steamers for the rescue of men overboard.

The COURT.—As I take the question it was whether there was any use in lowering a boat after the man has sunk; it does not take expert testimony to determine that fact.

(Testimony of Andrew Knudsen.)

Mr. COONAN.—That is my question,—after the man had sunk. I asked the question under the conditions that the man was not to be seen. I will withdraw the question.

Q. Have you any connection with the Coggeshall Company at the present time,—are you employed by the Coggeshall Launch Company at [213] the present time?

A. I was employed when I was on the boat.

Q. How long has it been since your employment?

A. I have not been with the Coggeshall Launch Company since the 1st of May.

Q. Of what year. A. 1915.

Q. Was that the date upon which you went back to the life-saving service?

A. I went back to the life-saving service the 1st of May; I left Coggeshall the 1st of May, went back to the life-saving service, but since I have not been employed regularly with Captain Coggeshall.

Q. Was that boat put in a fit condition to be lowered in the water and to proceed to any point necessary? A. It was, sir.

Q. Was the boat stopped immediately after the accident? A. Yes, sir.

Q. Were the engines reversed? .

A. She was backing.

Q. Did she go to the place where the accident occurred? A. She was brung up to the North.

Q. Did she stop near the point of the accident for a period of time? A. She did, sir.

Q. Do you know how long?

(Testimony of Andrew Knudsen.)

A. I cannot really tell you how long; that is a thing I did not take much notice of.

The COURT.—Q. Were you standing by the boat?

A. Yes, sir; I was standing right there.

Q. All the time?

A. All the time until everything was over.

Mr. COONAN.—Q. Were there enough men to lower that boat?

A. Yes, any amount of them.

Q. Did you ever chain that cargo port to prevent it being opened?

A. I chained it, yes, sir; Captain Krohnie put a chain on it.

Q. What happened to the chain?

A. They objected and we had to take it off; in case of an explosion or a deck fire the people would burn up in the ship, staying down there, they would not have a chance to escape. [214]

Q. That chain was taken off?

A. Yes, that chain was taken off.

Q. How far do you think the steamer "Antelope" proceeded after the accident, proceeded up the bay?

A. Her own length and a half or so.

Q. Do you think she went any further than her own length and a half? A. I do not think so.

Q. Was it possible upon that evening for anybody to have clambered over the lower deck up to the wharf?

Mr. DICKSON.—That is objected to as calling for the conclusion of the witness.

The COURT.—The objection is sustained.

(Testimony of Andrew Knudsen.)

Mr. COONAN.—Q. What was the condition of the tide that evening? A. It was dead low water.

Q. How far beneath the level of the wharf was the lower deck, when you landed?

A. I guess she was pretty near level with the wharf.

Q. I mean the lower deck?

A. The lower deck was pretty near 8 feet, 6 or 8 feet below the surface; the main deck was pretty near level with the wharf.

Q. Could you have clambered from the lower deck to the wharf on that evening?

The COURT.—Q. To the wharf?

Mr. COONAN.—Q. To the wharf, yes, sir?

A. Well, I don't know; that would be a hard thing for a man to do. He would not do it. If it was to save his life he might do it; he might try to do it.

Q. As far as you could see, was there any reason why that door should be open upon that particular night?

Mr. DICKSON.—That is objected to as calling for his conclusion.

The COURT.—The objection is sustained. [215]

Cross-examination.

Mr. DICKSON.—Q. You say that your duty was to close that door and attend to the gang-plank and put up the bar? You say that was the duty of deck-hand No. 2? A. Yes, sir.

Mr. COONAN.—I do not think that this witness said that it was the duty of deck-hand No. 2.

The COURT.—He said that he did it.

(Testimony of Andrew Knudsen.)

The WITNESS.—I must have understood the wrong thing.

Mr. DICKSON.—Q. On this particular night you were not stationed near the lower door at all, were you?

A. No, I did not have to because the door was closed before I came there.

Q. The door was closed before you got there?

A. Yes, sir.

Q. Do you know who closed it?

A. No, sir; I did not ask no questions.

Q. Now, then, you mean to say, on that evening you did not close the door at all?

A. I did not close the door, but that door was closed; I did not have any business to go down there.

Q. I will ask you if you testified before regarding these same occurrences at the Coroner's inquest over the death of Mr. Early? A. Yes, sir.

Q. You were testifying under oath, were you not?

A. I do not know; it is a good while since.

Q. Just look at that paper and tell me if that is your testimony given at that time (handing).

A. That is right, there is nothing wrong with that.

Q. That is all right, is it not?

A. Yes, sir; it is all right.

Q. You were testifying at that time immediately after the accident had occurred,—that was the next day after the accident occurred there, was it not?

A. It might be; I do not know who took it down.

Q. Your recollection of what occurred was a good deal better than it is now? A. Yes, sir.

(Testimony of Andrew Knudsen.)

Q. You could remember then more clearly?

A. I don't know; I [216] remember about the same now as I did then. I knew what I had to do then, the same as I do now.

Q. The same as now? A. Yes, sir.

Q. You testified at that time as to what your duties were?

A. I testify to that now, what my duties are.

Q. I will read this question and answer and ask you if that is the testimony you gave at that time:

“Q. What are your duties on the boat? A. My duty,—well, my duty is to attend to the doors and that cross-bar and to the gang-plank.” Were those your duties on the boat? A. Yes, sir.

Q. On this particular night you were not attending to that duty?

A. I was not? I was, sir, attending to those duties.

Q. You were attending to those duties?

A. I was.

Q. Which one of those duties did you perform on that evening?

Mr. COONAN.—I object; he admitted that he only performed the one of collecting the tickets.

Mr. DICKSON.—Q. Is that what you were doing that evening? A. That is what I was doing.

Q. Did anyone tell you, Mr. Knudsen, that when that door was closed the bar should be left down?

A. Nobody told me; no. They told me that if I had the door closed I did not have to have any bar there; when I had that door open, to put the bar in.

(Testimony of Andrew Knudsen.)

Q. They told you when the door was closed you did not need the bar there? A. Yes, sir.

Q. Who told you that?

A. I got the orders from Captain Krohnie.

Q. You say that the boys had a habit of opening that door on the way over? A. Yes, sir.

Q. Did it all the time? A. They did.

Q. You knew that they would do that?

A. I knew it. Well, I did not know it before they came there. I did not know what the boys [217] were going to do. I would certainly try to stop it if I knew.

Q. If you had known they were going to open that door, you would have put the bar up?

A. There was no need of it; the door was closed. If I had known the boys were going to do that, I could have said, "You must not open that door."

Q. If you had told the boys that it would have been all right? A. I am not a mind-reader.

Mr. COONAN.—I object to the question as calling for the conclusion of the witness.

The WITNESS.—If a man knew everything before, it would be all right.

Mr. DICKSON.—Q. In other words, all that you had to do was to tell the boys not to open the door?

A. I told them lots of times; that was not the first time, or the second time; I had lots of trouble there. Captain Krohnie had lots of trouble with them boys and the door; he tried to put a lock on it but they kept opening it.

Q. They kept opening it anyhow?

(Testimony of Andrew Knudsen.)

A. They kept on. The people objected to that.

Q. In spite of that fact you considered it was all right to leave the bar down?

A. So long as one thing was there, so long as the door was closed, it was all right, to leave the bar down.

Q. Did you ever take your station down by that door and see that it was not opened?

A. Once in a while I would go down there, after it was closed and take a look around. When I had a glance and was satisfied it was closed, it did not bother me much then; that is all.

Q. Did Nick ever go down there to take his station and see that that door was open?

A. Once in awhile; Nick's place was to take the tickets.

Q. That was not Nick's place?

A. When the pair of them is there I look out for them things; when I had the door closed, I did not have anything further to do.

Q. You say that you got small boats ready to lower away? [218]

Mr. COONAN.—It assumes something that is not in evidence. The witness said he got one boat ready to lower away.

The COURT.—That is true.

Mr. DICKSON.—Q. You say you got one boat ready to lower away? A. Yes, sir.

Q. Who was helping you with that boat?

A. Well, I cannot give you his name; I think there were lots of them on the upper deck.

(Testimony of Andrew Knudsen.)

Q. A number of them were helping?

A. A number of them were helping to get the boat ready.

Q. A number of passengers were helping you with the boat?

A. A number of the passengers; we had the boat all ready; there were lots looking along to see if they could see anything of the boy.

Q. There was no other man in the employ of Captain Coggeshall to help you?

A. No, I was alone. If there was anything, Captain Knudsen had to take my place; he had to pitch in himself; when I had to collect tickets and he came down to take my place, then I saw if the door was all right; then I put on the gang-planks, and then I lay the lines.

Q. That is the way you got along while Nick was in the hospital?

A. I did not know where Nick was; I knew he was sick; I did not ask any questions.

Q. Did you ever report to Captain Coggeshall about it?

A. No, sir; I had nothing to do with any of that reporting, at all; it was none of my business.

Q. You testified to a chain that had been placed upon that door at one time; I think you said it was put there by Krohnie? A. Yes, sir.

Q. Afterwards, the chain was taken off?

A. Yes, sir.

Q. That chain was not broken?

A. No, that chain was not broken. We got an

(Testimony of Andrew Knudsen.)

order to take that chain off; the men refused to be down [219] there with that door locked.

Q. That is the reason that the chain was taken off?

A. Yes, sir; that is the reason.

Q. They refused to be down there with the door locked?

A. That door could not be locked, in case of accident or anything happened.

Q. Was that the proper place for the men on the upper deck, on the upper deck?

A. On the middle deck.

Q. That is a proper place for them to ride?

A. They could be anywheres, I suppose. The people work hard, and if they want to be out of the wind and draft, they went down on the lower deck; I do not blame them.

Redirect Examination.

Mr. COONAN.—Q. What were the duties of deck-hand No. 2?

The COURT.—The duties of deck-hand No. 2 were, first, to close the door and put up and bar, and, second, to throw off the stern line, and third, to take in the gang-planks, and occasionally take tickets.

Mr. COONAN.—Q. When you went up on the Texas deck to lower the boat, get it ready for lowering, was Captain Krohnie by your side?

A. He was there, he was looking over the rail to see if he could see the boy.

Q. Is his cabin near there, his pilot-house?

A. It is right alongside.

Q. Did you have sufficient men to lower that boat?

(Testimony of Andrew Knudsen.)

A. Yes, sir.

Mr. DICKSON.—Q. How many men are required to lower that boat?

A. Two men, that is all; one with me.

**Testimony of Walter Coggeshall, for Petitioner
(Recalled).**

WALTER COGGESHALL, recalled.

Mr. COONAN.—Q. Were you allowed to keep passengers upon the lower deck?

A. We were, sir. [220]

Q. January 15, 1915?

A. Yes, sir. There was a narrow gangway leading from the lower deck upon her passenger deck, and the first year after I bought the ship, the inspectors, they surveyed that gangway leading from the lower deck to the passenger deck, and they told me that they considered there was not ample accommodation in case the passengers wanted to get from the lower deck to the upper deck in case of anything wrong. They ordered me—at that time, those steps were about that width (indicating), and the inspectors ordered me to widen those steps, and we made them about 6 feet wide, and they said: “When you complete that you notify us, and as soon as you do that, then you can carry all the passengers between-decks you want to.” They were altered, and we carried passengers there. On all steamers of that class, passengers are carried on that main deck.

Q. Reference has been made by Captain Krohnie concerning a chain, by which that port door was fas-

(Testimony of Walter Coggeshall.)

tened; did you have any knowledge of the fact of that chain being on that port door?

A. I did not know, until after it had been there two or three days.

Q. Some reference has been made to a chain that was broken; is this the same chain that was broken?

A. I do not know. I think the one that was broken was put on by Johnson; the chain that Krohnkie put on, I do know about, and I told him to take it off.

**Testimony of William Early, for Claimant
(Recalled in Rebuttal).**

WILLIAM EARLY, recalled in rebuttal.

Mr. DICKSON.—Q. Some testimony has been introduced here relative to the conduct of the passengers, that they were a hard crowd to handle; would you state who it was of the passengers that congregated around that door?

A. I do not know exactly who it was.

Q. What was the character of the people who congregated there?

A. They just came in there and we had time to get off the boat,—just to walk off. [221]

Q. Is it not a fact that they were mostly young fellows? A. Mostly young fellows.

Q. You mean fellows about like yourself?

Mr. COONAN.—That is objected to as leading.

The COURT.—Sustained.

A. Yes, sir.

Mr. DICKSON.—Q. Did you ever know or see

(Testimony of William Early.)

any of those passengers disobey an order that was given to them relative to that bar, whenever there was a man or officer there to see that it was carried out? A. No, sir.

Q. In other words, if there was a man stationed there to keep that bar in position, it was left in position?

Mr. COONAN.—That is objected to as leading.

The COURT.—The objection is overruled.

A. Yes, sir; it was left there.

Mr. DICKSON.—Q. You never saw any force used,—I will ask you whether or not you ever saw any force used by any of those passengers against any officer or men on that boat?

A. No, sir; none.

**Testimony of Joseph Whelihan, for Claimant
(Recalled in Rebuttal).**

JOSEPH WHELIHAN, recalled in rebuttal.

Mr. DICKSON.—Q. What was the character of the men who usually congregate around that cargo port door?

Mr. COONAN.—That is objected to as calling for the conclusion of the witness.

A. All young fellows, like myself.

Q. Like the young fellow that got drowned?

A. All young fellows, the older fellows always stayed back.

Q. Did you ever see or know of any trouble between any of those passengers and the deck-hands, or officers of that boat?

A. Never any trouble that I seen. [222]

(Testimony of Joseph Whelihan.)

Q. Did you ever know or see any of those passengers disobey an order relative to that door, whenever there was an officer or deck-hand there to carry out the orders? A. No, sir.

Q. Did you ever hear any orders given relative to the door?

A. No, I never heard any orders given about the door; they never said nothing about opening the door.

Q. Have you ever heard them give orders relative to the bar?

A. Yes, sir; they told us to leave the bar alone until we landed.

Q. If there was a man stationed there, they obeyed that man? A. Yes, sir; always.

Cross-examination.

Mr. COONAN.—Q. Were you on board the boat upon the occasion when Captain Krohnie took her out into the bay because the boys were so unruly?

A. I was on the boat; it was not because the boys were unruly. It was the time the boys—they were all standing up on one side of the boat, and he tried to make us go back, the boat listed. We all went out into the bay, and he kept us there four or five minutes, and they would not do a thing for him that night. He went to Fenwick and tried to have us all fired. Fenwick gave us a call down.

The COURT.—Mr. Fenwick is manager?

A. In this county, for the Hammond Lumber Company.

Mr. COONAN.—Q. Is it not a fact that ever since

(Testimony of Joseph Whelihan.)

that time the boys, just the same as before, rush to one side of the boat?

A. No, sir; not until they get pretty near landed after that.

**Testimony of Emmett Whelihan, for Claimant
(Recalled in Rebuttal).**

EMMETT WHELIHAN, recalled in rebuttal.

Mr. DICKSON.—Q. What was the character of the men who congregated that cargo-port door?

A. All young fellows.

Q. Were they unruly or otherwise?

A. They were not unruly; [223] they were a decent sort of a bunch, so far as I could see; I have known them quite a long time.

Q. You know most of those young fellows?

A. Yes, sir.

Q. All friends of yours and live around town, coming from families in Eureka? A. Yes, sir.

Q. Did you ever see or know of any trouble between them and the officers of the boat?

A. No, sir.

Q. Did you ever see or know of an officer of the boat having any trouble in getting the people to obey orders? A. No, sir.

Q. If there was a man stationed there to keep that door in position, was it kept in position?

A. It was.

Q. Do you know of any officer having any trouble in keeping the door in position? A. No, sir.

Q. If there was a man stationed there to keep that

(Testimony of Emmett Whelihan.)

door in position, was it kept in position?

A. It was.

Q. Did you ever hear them give any orders relative to the door?

A. Never heard anything about the door.

Testimony of Alva Moss, for Claimant (Recalled in Rebuttal).

ALVA MOSS, recalled in rebuttal.

Mr. DICKSON.—Q. What was the character of the men who usually congregated around that cargo-port door?

A. They were pretty good sort of fellows.

Q. All young fellows? A. Yes, sir.

Q. Do you know of any trouble between them and the men or officers of the boat? A. No, sir.

Q. If they were given orders relative to that bar, were those orders carried out and obeyed?

A. Yes, sir.

Q. Do you know of any time when there was a man there to see that those orders were carried out, that they disobeyed the orders in spite of it?

A. No, sir. [224]

Q. Did you ever hear any orders relative to the opening or closing of that door? A. No, sir.

Mr. DICKSON.—That is our case.

Mr. COONAN.—I would like to move for a judgment in favor of the petitioners, and each of them, on the ground that a cause of action has not been stated; and that if a cause of action has been stated, the evidence is not sufficient to support the cause of action.

The COURT.—The motion is denied.

Mr. COONAN.—Exception.

[Endorsed]: Filed Oct. 18, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [225]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 23d day of January, in the year of our Lord, one thousand nine hundred and seventeen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition to Limit the Liability of the Owners of the Steam Vessel "ANTELOPE," etc.

(Minutes—Order Awarding Claimant the Sum of \$5,000, and Limiting the Liability of Owners of "Antelope.")

Pursuant to opinion this day filed, it is ordered the motion for judgment on the pleadings, heretofore submitted herein, be, and the same is hereby denied and that a decree be entered herein limiting liability, as prayed for, but decreeing that claimant be awarded the sum of Five Thousand (\$5,000) Dollars and costs against the Coggeshall Launch Company, to be satisfied out of the stipulation on file. [226]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel “ANTELOPE,” for Limitation of Liability.

ELIZA A. EARLY, Claimant.

(Opinion and Order Awarding Claimant the Sum of \$5,000, and Limiting the Liability of Owners of the “Antelope.”)

CLARENCE COONAN, Esq., Proctor for Petitioners.

W. ERNEST, Esq., Proctor for Claimant.

The steam ferry-boat “Antelope” was engaged as a common carrier in the business of carrying passengers across Humboldt Bay between the ports of Eureka and Samoa. She was run by the Coggeshall Launch Company, who had possession of her under a contract of purchase from the Humboldt Lumber Company. Her passengers consisted for the most part of workmen going back and forth from their homes in Eureka to their work at the Samoa Mill, and for that reason her passenger list remained practically the same. A large number of these men regularly carried on the freight deck, that is to say, the lower of the two decks. This lower deck is almost on a level with the surface of

the water, and is wholly enclosed. On the starboard side, however, through this enclosure there is a doorway six or eight feet wide, known as the cargo port, through which it was the custom of petitioners on [227] the Samoa side to take on both passengers and freight. This doorway is closed by a sliding door, which is opened by sliding it aft. When the door is open and the vessel is away from the dock, the open doorway leads right out to the water, and there is nothing to prevent a passenger from falling or walking directly through it into the water, as outside of the door there is but a guard, level with the deck, and about a foot in width. As a protection to the passengers on the lower deck therefore, a bar about six inches in width, and, when in place, extending across the port opening at a height of between three and four feet, had been provided by order of the inspector. Of course so long as the door remained closed, the protection afforded by the bar was unnecessary. But it is in evidence and must be so found that it was the almost invariable practice of the vessel to have the bar in place during her trips across the bay whether the door was open or closed at the time of leaving the dock.

The "Antelope" was required by law, as appears from her certificate of inspection to carry as her complement of officers and crew, one licensed master and pilot, two deck-hands, one licensed chief engineer and one fireman. On the evening of January 15th, 1915, however, and for nine days prior thereto, she had been running short-handed, one of her deck-hands, named Nick, being sick and in the

hospital. On that evening, at 5:30, she started on her regular voyage from Samoa to Eureka without having in place the bar above mentioned, [228] which was usually placed across the cargo-port doorway to protect passengers from the danger of falling through. There is some conflict of testimony as to which one of the two deck-hands was charged with the duty of looking after the doorway. The witnesses for claimant testified that Nick, the deck-hand who was absent, always put up the bar. The witnesses for petitioners testified that it was the duty of Andrew, the other deck-hand, to look after the condition of the doorway, and that it was Nick's duty to take tickets, while Andrew was attending to the stern line, the freight gang-plank and the cargo-port door. All are agreed, however, that on this particular evening Andrew was engaged in taking tickets, and that he neither closed the door nor put up the bar. Though the bar was not put up at all on this evening, yet the door was closed by one of the passengers before the "Antelope" left Samoa, and the deck-hand noticed that fact, but made no effort to ascertain whether or not the bar was in place. He claims, and indeed that is the claim of petitioners, that his full duty was performed either when the door was closed, or the bar was in place, and that there was no necessity for putting up the bar when the door itself was closed. It is an admitted fact, however, and indeed could not well be denied, that the door, even if closed at the time of leaving Samoa, or at any time subsequent, was invariably opened by the passengers before reaching the

Eureka dock, usually when the landing whistle was blown. The evidence shows without controversy that immediately upon the blowing of the whistle for landing, and while still in the open [229] waters of the bay at some distance from the dock, some passenger or other would open the sliding door. This was not a casual occurrence, nor even merely a frequent occurrence, but an invariable custom that had been in vogue for a number of years. This custom was well known to all the officers and employees of the boat, as well as to captain Coggeshall himself, the president of the company. The closed door was therefore a protection to the passengers, only until some passenger opened it, a thing which invariably happened at some stage of the voyage after leaving Samoa, and before reaching Eureka. There is testimony to the effect that the officers and crew of the vessel had at different times made efforts to prevent the passengers from opening this door. Many requests of this kind are said to have been made, and at one time the door was even fastened with a chain. This chain it is said was broken by the passengers and the door opened as usual. That such requests were made is stoutly denied by claimant's witnesses, themselves passengers on the vessel for a number of years. All agree, however, that such requests, if made, were never heeded, and it is a fact that no determined or continued effort was made by officers or crew to prevent the door from being opened. Nor does it appear that the deceased Early had ever had any notice or knowledge of any of these requests, either by the

posting of notices or otherwise. The most that can be claimed in this respect is that a few half-hearted attempts were made to stop the practice of opening the door during the voyage, and that when these attempts failed the practice was acquiesced [230] in.

On the evening of January 15th, 1915, and with conditions on the "Antelope" as above set forth, George D. Early was a passenger from Samoa to Eureka, and was among those carried on the lower deck. He had been going back and forth on the vessel between Eureka and Samoa for several years. On this evening as the vessel approached the Eureka side the cargo-port door was opened as usual by one of the passengers. Indeed, it was opened by the same passenger who had closed it before leaving Samoa. He was assisted in opening the door by another passenger and when the door was within about two feet of being fully opened it stuck, and the two passengers who had opened it thus far seemed unable to get it fully opened. At this stage of the proceedings Early came to their assistance and placed his hand on the door to aid in shoving it back, and whether because of a lurching of the vessel, or because the support afforded him by the door failed him by reason of its sliding further back, he fell apparently backwards through the open doorway into the waters of the bay and was drowned. An action was begun by his mother, on February 3d, 1915, in the Superior Court of Humboldt County against the Hammond Lumber Company and the Coggeshall Launch Company to recover

damages for his death, the amount sued for being \$50,000. The defendants in that action on March 19th, 1915, filed in this court their petition for limitation of liability, and thereafter upon due proceedings had the value of the "Antelope" and pending freight was fixed at \$8,005, for which sum a stipulation [231] was given, and an order entered here restraining further proceedings in the State Court. The amount claimed by Eliza D. Early, the mother, was later reduced by an amended complaint to \$7,500 for which sum she has filed a claim in this proceeding.

The questions then for determination are:

1. Are the owners liable at all under the foregoing facts?
2. If so, may such liability be limited to the value of the vessel and freight pending?

That the owners were guilty of negligence seems to me to be quite clear. In the first place, the "Antelope" was being operated with one man short contrary to the requirements of the law. That to the absence of this man was due the fact that the bar across the port opening was not in place seems equally clear. Day after day the passengers on the lower deck had seen the bar in place whether the door was open or shut when leaving Samoa. If the door was closed when the voyage began, at some stage of the voyage it was opened by the passengers, and always, until the evening of the accident, the bar was found to be in place. It had been provided for the very purpose of protecting the passengers when the door was open. It does not seem to me

to be a sufficient excuse for the absence of the protecting bar to say, "It was not needed when the door was closed, and the door was closed on this trip when the "Antelope" left Samoa. It would be the grossest kind of negligence to leave the deck with an opening eight feet wide leading directly to the water, and with the lower deck crowded [232] with passengers. But that the door would be open at some stage of the voyage was a thing not only to be readily foreseen but to be absolutely counted upon. Against this contingency the vessel should have provided. Even if it be said that the passengers had no right to open the door, yet this does not meet the difficulty, for the safety of those that did not open the door was as such jeopardized by the unprotected doorway as was the safety of those who did. And such passengers were entitled to full protection. So that it was the duty of the vessel either to prevent the opening of the door, or to have the bar in place. In view of the known fact that the door would be opened it was the duty of the vessel to have the bar in place. And indeed it must be said for the vessel that it was as a rule less negligent than it would now ask the Court to believe. Because in the face of the testimony of the passengers who constantly rode on the lower deck, saw the door opened day after day, and always found the bar in place, I am not disposed to accept the theory, which might or might not be of service in this particular proceeding, that the bar was never put up when the door was closed. For if I did, I would be forced to the conclusion that the

vessel was constantly negligent, instead of being negligent only on this particular occasion. I believe it to be true that the bar was regularly in place except on this evening and that the passengers on the lower deck, aware of that fact, had come to rely on it, and were not bound to take the precautions which might be required of them if they knew that they were riding [233] day after day alongside of an unprotected doorway eight feet in width. The vessel then was negligent in not having the bar in place upon leaving Samoa, and such negligence may well be attributed to the fact that it was operating short-handed contrary to law. But it is not at all clear that this negligence was with the privity or knowledge of the owners. They had no personal knowledge that the bar was not put in place, or that the vessel was short-handed. For this reason they may maintain the present proceeding.

It is claimed by petitioners that even if they be held to have been guilty of negligence, still claimant cannot recover because of the contributory negligence of deceased. This contributory negligence is said to have consisted in his assisting in opening the door, and in his failure to observe that the bar was not in place. Contributory negligence is an affirmative defense, is always relative, and the burden of establishing it is upon the party who asserts it. It must be observed in this connection that deceased did not open the door at all at the place where he fell through, so that what he did, did not contribute in any degree to the lack of protection at that place occasioned by the absence of the

bar. But the opening of the door in any event was not an unlawful act, nor was it one negligent *per se*, because it was never attended by danger when the bar was in place. Nor can it be said that the mere approach of deceased to the opening already made by others was negligent, as he had every reason to suppose that there was no danger in so doing, for at all times theretofore the bar had been in place. Nor was [234] he bound under all the circumstances to assure himself that the bar was not in place at that time, because he was bound only to the exercise of such care as an ordinary prudent person would have exercised under the circumstances. He could not anticipate, and was not bound to anticipate that the vessel had left Samoa with this doorway unprotected. He with the other passengers had become so accustomed to the presence of the bar, that he had no reason to suspect that it was not in place, as indeed there is no good reason for its not being in place. From all the surrounding circumstances I am compelled to the belief that with his attention fixed on the door which had stuck, he approached it with his side to the doorway, without observing or pausing to observe its unprotected condition, but relying on the fact that the bar had always been in place. It was between five-thirty and six o'clock in the evening of January 15th, and while not yet dark, it was not wholly light. And though an examination would have disclosed to him the absence of the protecting bar, his failure to make such examination, having in view all of the circumstances, can neither excuse such absence, nor charge

him with such degree of negligence as to relieve petitioners from responsibility.

The motion for judgment on the pleadings is denied and a decree will be entered limiting liability as prayed for, but decreeing that claimant be awarded the sum of \$5,000, and costs against the Coggeshall Launch Company, to be satisfied out of the stipulation on file.

January 23d 1917.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 23, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [235]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 5th day of February, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,794.

In the Matter of the Petition to Limit the Liability of the Owners of the Vessel "ANTELOPE," etc.

(Minutes—Order for Decree.)

Pursuant to order this day filed, it is ordered that the damages caused by the death of George D. Early be, and the same is hereby fixed in the sum of Five

Thousand (\$5,000) Dollars, and that a decree in conformity herewith be duly drawn and entered. [236]

At a Stated Term of the District Court of the United States of America.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.

Held at the courtroom, in the city and county of San Francisco, on Monday, the fifth day of February, in the year of our Lord one thousand nine hundred and seventeen.

No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

ELIZA A. EARLY,

Claimant.

(Order for Decree.)

This matter having been heretofore submitted to the Court for consideration and decision, now, after due consideration had, it is by the Court ordered that the damages caused by the death of George D. Early be, and the same is hereby fixed in the sum of Five Thousand Dollars (\$5000), and a decree in conformity herewith be duly drawn and entered.

M. T. DOOLING,

Judge of the United States District Court.

[Endorsed]: Filed Feb. 5, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [237]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

ELIZA A. EARLY,

Claimant.

Final Decree.

This cause heretofore came on regularly to be heard by the Court, upon the petition of the Coggeshall Launch Company, a corporation, and Hammond Lumber Company, a corporation, under section 4382 and 4389 of the Revised Statutes of the United States, upon the verified claim and answer of the following claimant in answer to said petition, to wit:

The claim of Eliza A. Early, for damages in the sum of \$7,500 for causing the death of George D. Early.

And upon the proofs submitted by the petitioner and said claimant, and counsel for all parties having been heard thereon, and the cause having been tried upon its merits and submitted to the Court for its determination on the question of a motion for judg-

ment on the pleadings, the jurisdiction of claimant to maintain her damages, and liabilities of petitioners for whatever damages sustained by claimant and respondent by reason of the said disaster; and after due deliberation thereon, the Court delivers its decision in writing, and orders judgment for claimant and respondent; and from which it appears to the Court, and the Court finds;

That the petitioner, Coggeshall Launch Company, was and is a corporation duly organized, created and existing under and by virtue of the laws of the State of California, with its principal place of business in the city of Eureka, county of Humboldt, State of [238] California.

That the petitioner, Hammond Lumber Company, was and is a corporation duly organized, created and existing under the laws of the State of New Jersey, with its principal place of business in the city and county of San Francisco, State of California.

That petitioners, Coggeshall Launch Company and Hammond Lumber Company, at all times mentioned in the petition, claim and answer herein, were the owners of the steam vessel "Antelope," together with its engines, boiler, boats, tackle, apparel, furniture, and appurtenances.

That at all times mentioned in said petition, claim, and answer, the said petitioner, Coggeshall Launch Company, run, operated, and had possession of the steam ferry-boat "Antelope," under a contract of purchase from the petitioner, Hammond Lumber Company;

That the said ferry-boat "Antelope" was about one hundred and one net tons burden gross measurement and enrolled and registered according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and within the Northern District of California.

That petitioner, Coggeshall Launch Company, without participation of any character therein by the petitioner, Hammond Lumber Company, for a long time prior and on the 15th day of January, 1915, was operating a ferry system upon Humboldt Bay, county of Humboldt, State of California, between the city of Eureka and the town of Samoa, using and employing in that connection, among other vessels, the steam ferry-boat "Antelope"; that on said 15th day of January, 1915, said steam ferry-boat "Antelope," under the control and operation of the petitioner, Coggeshall Launch Company, departed from the town of Samoa on a voyage across Humboldt Bay to the city of Eureka in accordance with a schedule maintained by said petitioner, Coggeshall Launch Company;

That at all the times mentioned in the said petition, claim and answer filed herein, the said steam ferry-boat "Antelope" was [239] engaged as a common carrier in the business of carrying passengers across Humboldt Bay between the ports of Eureka and Samoa in the county of Humboldt, State of California, and within the Northern District of California.

That at all times mentioned in said petition, and the claim and answer thereto and therein, the said

ferry-boat "Antelope" was run and operated by the petitioner, Coggeshall Launch Company, who had possession of said ferry-boat "Antelope" under a contract of purchase from the petitioner, Hammond Lumber Company; that the passengers of said ferry-boat "Antelope" consisted for the most part of workmen going back and forth from their homes in Eureka to their work across Humboldt Bay at the Samoa mill, and for that reason the passenger list on said ferry-boat "Antelope" remained practically the same. That a large number of these men were regularly carried on the freight deck, that is to say, the lower of the two decks of said ferry-boat. That this said lower deck was almost on a level with the surface of the water, and wholly enclosed; that on the starboard side, through this enclosure, there is a doorway six or eight feet wide, known as the cargo port, through which it was the custom of petitioners on the Samoa side of Humboldt Bay to take on both passengers and freight. That this doorway was closed by a sliding door, which was opened by sliding it aft. That when this door was open and the vessel away from the dock, the open doorway led right out to the water, and there was nothing to prevent a passenger from falling or walking directly through it into the water. That as a protection to the passengers on the said lower deck, the United States Inspector ordered that a bar about six inches in width, when in place, extend across the said port opening at a height of between three and four feet. That it was the invariable practice of the vessel to have the said bar in place during the

trips of said vessel across the said Humboldt Bay whether the said door was opened or closed at the time of leaving the dock. [240]

That at the times mentioned in the said petition, claim and answer, the said ferry-boat "Antelope" was required by law, as appeared from her Certificate of Inspection, to carry as her complement of officers and crew, one licensed master and pilot, two deck-hands, one licensed chief engineer and one fireman.

That on the evening of January 15th, 1915, and for nine days prior thereto, the said ferry-boat "Antelope" had been running and operated short-handed by reason of one of her deck-hands, named Nick, being sick in the hospital.

That on the evening of January 15th, 1915, at about 5:30 P. M. the said ferry-boat "Antelope" started on her regular voyage from Samoa to **Eureka** without having in place the aforesaid mentioned bar, which was usually placed across the cargo-port doorway to protect passengers from the danger of falling through said opening into the water. That on this particular evening and voyage, to wit, on January 15th, 1915, the said deck-hand Nick was absent as hereinbefore found, and the deck-hand Andrew was engaged in taking tickets, and that the said deck-hand Andrew neither closed the said cargo-port door nor put up the said bar across said doorway, and that the said bar was not put up in place; and in fact the said bar was not put up at all on this particular voyage and evening.

That at the time of the sailing of said steam ferry-

boat "Antelope" as hereinbefore found, before leaving the dock at Samoa, the said cargo-port door on the said lower deck was not closed by the officers or crew of said vessel, although the said bar was not put up at all during that voyage and evening, but the said door was closed before said vessel left Samoa by one of the passengers on the said lower deck.

That the said cargo-port door was invariably opened by some one of the passengers before reaching the Eureka Dock, usually being opened when the landing whistle was blown. That immediately [241] upon the blowing of the whistle, on said steam ferry-boat "Antelope," for landing and while still in the open waters of the bay at some distance from the dock, some passenger or other would open the said cargo-port sliding door. That the said opening of the said cargo-port door was not a casual occurrence, nor even merely a frequent occurrence, but was an invariable custom that had been in vogue for a number of years. This custom of so opening the said cargo-port door was well known to all the officers and employees of the said steam ferry-boat "Antelope," and was also known to Captain, Walter Coggeshall, the president of petitioner, Coggeshall Launch Company.

That the closed cargo-port door was a protection to the passengers on the lower deck of the said ferry-boat "Antelope" only until some passenger in accordance with said custom opened it, a thing which invariably happened at some stage of the voy-

age after leaving Samoa and before reaching Eureka.

That said passenger, George D. Early, deceased, had never had any notice or knowledge of any efforts made by the officers and crew of the said ferry-boat "Antelope" to prevent the passengers thereof from opening the said cargo-port door, either by the posting of notices or otherwise.

That on said voyage as hereinbefore found on the said evening of January 15th, 1915, and with conditions on the said steam ferry-boat "Antelope" as hereinbefore found and set forth, said George D. Early, now deceased, was a passenger on said ferry-boat "Antelope" from Samoa to Eureka, and was among those passengers carried on the lower deck of said ferry-boat. That the said passenger George D. Early, now deceased, had been going back and forth on the said ferry-boat "Antelope" between Samoa and Eureka for several years. That on the said evening and voyage, as hereinbefore found, as the said steam ferry-boat "Antelope" with her said passenger and passengers thereon approached the Eureka side of said Humboldt Bay the said cargo-port door was opened as usual by one of [242] the passengers, in this instance being opened by the same passenger who had closed it before leaving Samoa: That the said passenger in opening the said door was assisted by another and when the said door was within about two feet of being fully opened, it stuck, and the two passengers who had opened it thus far seemed unable to get it fully opened. That at this stage of the proceedings the

said George D. Early, now deceased, came to their assistance and placed his hand on the door presumably to aid in shoving it back, and either because of a lurching of the vessel, or because the support afforded him by the door failed him by reason of its sliding further back, he fell apparently backwards and by reason of the fact that the bar usually placed across said doorway was not in place he fell backwards through the open doorway into the waters of Humboldt Bay and was drowned.

That the said steam ferry-boat "Antelope" on the said voyage and evening when the said passenger George D. Early, now deceased, was drowned as hereinbefore found, was being operated with one man short contrary to the requirements of law; and that it was owing to the absence of this man was due to the fact that the said bar was not in place across the said cargo-port opening on said lower deck of the said steam ferry-boat. That the said bar had been provided for the very purpose of protecting passengers from falling into the waters of the bay when the said cargo-port door was opened.

That it was gross negligence on the part of petitioner, Coggeshall Launch Company, to leave the dock, on the said voyage and evening hereinbefore found, with an opening six or eight feet wide, such as was the said cargo-port door leading directly to the water, and with the said lower deck of said ferry-boat crowded with passengers, and without the said protecting bar across said cargo-port doorway; and that it was the duty of the said operators of the said vessel to have the said bar in place across

the said [243] cargo-port opening.

That the said George D. Early, now deceased, did not open the door at the place where he fell through, and he did not contribute in any degree to the lack of protection at said place on said ferry-boat "Antelope" occasioned by the absence of the said bar.

That at the time the said George D. Early, now deceased, fell into the waters of Humboldt Bay and was drowned, as hereinbefore found, it was between five thirty and six o'clock in the evening of January 15th, 1915, and while not yet quite dark, it was not, however, wholly light.

That in operating the said steam ferry-boat "Antelope" on the voyage, day and evening hereinbefore found, one man short contrary to the requirements of law, resulting in the fact that the bar across the said cargo-port door opening was not in place; and leaving the dock at Samoa without having the said bar in place across the said cargo-port opening some six or eight feet wide, leading directly to the water, on said lower deck of said ferry-boat then filled with passengers, under the then existing and prevailing conditions, the said petitioner, Coggeshall Launch Company, and its said steam ferry-boat "Antelope" was guilty of gross and inexcusable carelessness and negligence, and her said passenger George D. Early was drowned by reason of said carelessness and negligence.

That the said drowning of the said passenger George D. Early as hereinbefore found, occurred within the Admiralty and Maritime Jurisdiction of the United States, and within the territorial limits

and jurisdiction of the State of California.

That said George D. Early was a passenger on board the said steam ferry-boat "Antelope" at the time he was drowned as hereinbefore found; that he was at the time of his death a minor of the age of twenty years, strong and robust mentally and physically, and was in receipt of good wages. That Eliza A. Early, claimant and respondent herein, is the mother of the said George D. Early, [244] now deceased, and she was partially dependent upon her said son George D. Early for her maintenance and support; that James M. Early, father of the said decedent, had deserted his family many years before the drowning of said decedent as hereinbefore found, and was at the time of the death of said George D. Early still living separate and apart from them, and had not returned to them in the meantime. That claimant and respondent is entitled to bring this action and claim under and by virtue of the provisions of sections 376 and 377 of the Code of Civil Procedure of the State of California.

That the damages sustained by the said claimant and respondent, Eliza A. Early, mother of said George D. Early, by reason of the death of said George D. Early, caused by the gross carelessness and negligence of said petitioner, Coggeshall Launch Company, as aforesaid is five thousand dollars (\$5,000):

NOW, THEREFORE, on motion of W. Ernest Dickson, Esq., proctor for claimant and respondent—

IT IS ORDERED, ADJUDGED AND DECREED, that the said petitioners, Coggeshall Launch Company and Hammond Lumber Company, as the owners of the said steam ferry-boat "Antelope," her engines, boiler, boats, tackle, apparel, furniture and appurtenances, are entitled to the benefits of the limitations liability, provided for and embodied in Sections 4282 to 4289 of the Revised Statutes of the United States and the several acts and statutes amendatory thereof and supplemental thereto; and that said petitioner, Coggeshall Launch Company, a corporation, is liable only to the amount of the value of the said steam ferry-boat "Antelope" and pending freight appraised and fixed by this Court at \$8,005.

IT IS FURTHER ORDERED AND ADJUDGED that the motion for judgment on the pleadings be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said claimant and respondent, Eliza A. Early, recover herein against petitioner, Coggeshall Launch Company, a corporation, the sum of [245] Five Thousand Dollars (\$5,000), together with legal interest thereon from the date hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that claimant and respondent, Eliza A. Early, recover her costs taxed at the sum of ——— Dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that both sums above mentioned may be paid to the proctor of claimant and respondent, and that said proctor may enter complete satis-

faction of this decree upon payment to him of the said sums hereinbefore specified.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless this judgment and decree be satisfied, or proceedings thereon be stayed on appeal, within the time limited and prescribed by the rules and practice of this Court, the claimant and respondent have execution to enforce satisfaction of this judgment and decree, or so much thereof as shall remain unsettled, and the stipulators for value of the interest of petitioner, Coggeshall Launch Company, cause the engagements of their stipulations to be performed and fulfilled, or show cause within the time prescribed by law, why execution should not issue against their goods, chattels and lands to satisfy this decree.

Done in open court at a stated term, etc., this 5th day of February, A. D. 1917.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Feb. 5, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk [246]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 13th day of February, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable MAURICE T. DOOLING, District Judge, et al.

No. 15,794.

In the Matter of the Petition to Limit the Liability
of the Owners of the Vessel "ANTELOPE,"
etc.

(Order Staying Execution of Judgment.)

In this matter, on motion of proctor for and on behalf of petitioner herein, the Court ordered that the execution of the judgment heretofore entered herein be, and the same is hereby stayed for the period of fifteen (15) days from and after the date hereof. [247]

In the United States District Court for the Northern District of California, Southern Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel ANTELOPE," for Limitation of Liability.

(Notice of Appeal.)

To the Clerk of the Above-entitled Court, to Claimant, Eliza A. Early, and to Her Proctor, W. Ernest Dickson:

You and each of you please take notice that Coggeshall Launch Company, one of the petitioners herein, hereby appeals from the final decree made and entered herein on the 15th day of February, 1917, to the next United States Circuit Court of Appeals for the Ninth Circuit to be holden in and for said

Circuit at the City of San Francisco, State of California.

Dated Eureka, California, February 17th, 1917.

CLARENCE COONAN,

NAT SCHMULOWITZ,

Proctors for Petitioner Coggeshall Launch Company.

[Endorsed]: Filed Feb. 19, 1917. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [248]

In the United States District Court for the Northern District of California, Southern Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel ANTELOPE," for Limitation of Liability.

Affidavit of Mailing Notice of Appeal.

State of California,
County of Humboldt,—ss.

Clarence Coonan, being first duly sworn, deposes and says: That he is a male citizen of the United States over the age of eighteen years and not a party to the above-entitled action; that on the 17th day of February, 1917, he served the Notice of Appeal in the above-entitled cause by enclosing a copy of said notice of appeal in a sealed envelope addressed to the claimant's proctor, W. Ernest Dickson, at Eureka, California, where said proctor main-

tains his office, and deposited the same with postage prepaid in the postoffice at Eureka, California.

CLARENCE COONAN.

Subscribed and sworn to before me this 21st day of February, 1917.

[Seal]

H. L. RICKS, Jr.,

Notary Public in and for the County of Humboldt,
State of California.

[Endorsed]: Filed Feb. 24, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [249]

*In the United States District Court in and for the
Northern District of California, Southern Divi-
sion.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

Assignment of Errors.

Now comes the Coggeshall Launch Company, a corporation, petitioner in the above-entitled action, and appellant herein, and says:

That in the record, opinion, decision and final decree in said cause there is manifest and material error and said appellant now makes and files and presents the following assignments of errors on which it relies, to wit:

1. The District Court for the Northern District of California, Southern Division, erred in rendering

the decree herein of date the 5th day of February, 1917, against the steam vessel "Antelope" and said petitioner, Coggeshall Launch Company.

2. The District Court above named erred in entering judgment in favor of claimant Eliza A. Early and against Coggeshall Launch Company, a corporation, on the testimony adduced at the trial of said cause.

2. The said District Court erred in making the decision and in rendering the judgment thereon as the same were contrary to, and against law, and said District Court erred in making, giving, rendering and entering judgment in favor of said claimant and against said petitioner Coggeshall Launch Company, and said [250] District Court erred in failing to give, make, render and enter its judgment in favor of petitioner Coggeshall Launch Company, and against said claimant.

4. The said District Court erred in rendering judgment in favor of claimant and against petitioner Coggeshall Launch Company in the sum of \$5,000 and costs.

5. The said District Court erred in failing to find that the death of George D. Early did not result from the negligence of petitioner Coggeshall Launch Company or its employees or agents, and to thereupon render judgment in favor of Petitioner Coggeshall Launch Company.

6. The said District Court erred in failing to find that the death of George D. Early resulted from his own negligent act and to thereupon render judgment

in favor of said petitioner Coggeshall Launch Company.

7. The said District Court erred in failing to find that the death of George D. Early resulted from his contributory negligence and thereupon to render judgment in favor of petitioner Coggeshall Launch Company.

8. The said District Court erred in failing to find that the death of George D. Early resulted from the concurrent negligent act or acts of George D. Early, one Emmet Whelihan and one Alva Moss, and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company.

9. The said District Court erred in failing to find that the death of George D. Early resulted from the negligent act of one Emmet Whelihan or from the negligent act of one Alva Moss or from the concurrent negligent act of one Emmet Whelihan and one Alva Moss and thereupon to enter judgment in favor of petitioner Coggeshall Launch Company. [251]

10. The said District Court erred in finding that the petitioner Coggeshall Launch Company was negligent in failing to put up a bar across a cargo-port door and thereupon rendering judgment in favor of said claimant.

11. The said District Court erred in finding that the petitioner Coggeshall Launch Company had not protected and warned passengers against opening of the cargo-port door by said passengers and thereupon rendering judgment in favor of said claimant.

12. The said District Court erred in finding that knowledge of the custom of passengers opening the

cargo-port door against orders of the petitioner Coggeshall Launch Company was negligence by the said petitioner and thereupon rendering judgment in favor of said claimant.

13. The said District Court erred in finding that the death of George D. Early resulted from a failure by petitioner Coggeshall Launch Company to prevent the continuance of the custom of passengers to open the cargo-port door and thereupon rendering judgment in favor of said claimant.

14. The said District Court erred in finding that the claimant was damaged by petitioner Coggeshall Launch Company in the sum of \$5,000 and thereupon rendering judgment in favor of said claimant.

15. The said District Court erred in finding that the death of George D. Early resulted from the negligence of the petitioner Coggeshall Launch Company in operating the Steam Vessel "Antelope" with a crew one man short, the failure to have another member to perform the duties of said absent member of the crew and to put up the bar in the cargo-port door of the steam vessel "Antelope," and to thereupon render judgment in favor of said claimant.

16. The said District Court erred in not finding that [252] the death of George D. Early resulted from the contributory negligence of said George D. Early in that he assisted in creating the open unprotected doorway through which he fell to his death, and in that he approached a doorway which, as was apparent to said George D. Early, was unprotected.

17. The said District Court erred in not sustain-

ing the objection of proctor for petitioner Coggeshall Launch Company that all evidence introduced by claimant was incompetent, irrelevant and immaterial.

18. The said District Court erred in not rendering judgment for petitioner Coggeshall Launch Company on the pleadings.

Dated March 16, 1917.

CLARENCE COONAN,
NAT SCHMULOWITZ,

Proctors for Appellant and Petitioner Coggeshall Launch Company.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [253]

In the United States District Court, in and for the Northern District of California, Southern Division.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Admission of Service of Assignment of Errors.

Service of a copy of the assignment of errors in the above-entitled cause is hereby admitted by me this 19th day of March, 1917.

W. ERNEST DICKSON,
Proctor for Claimant Eliza A. Early.

[Endorsed]: Filed Mar. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [254]

In the United States District Court for the Northern District of California, Southern Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Corporation,
Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

COGGESHALL LAUNCH COMPANY, a Corporation,

Appellant,

vs.

ELIZA A. EARLY,

Appellee.

Notice of Filing Bond on Appeal.

To Appellee, Eliza A. Early, and to W. Ernest Dickson, Esq., Her Proctor:

You and each of you please take notice that a bond on appeal herein has been this day filed in the office of the Clerk of the District Court of the United States for the Northern District of California and executed and given by Samuel L. Elkwood of Eureka, California, and William T. Armstrong of Eureka, California.

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Appellant. [255]

*In the United States District Court for the Northern
District of California, Southern Division.*

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability

**Affidavit of Mailing Notice or Filing Bond on
Appeal.**

State of California,

City and County of San Francisco,—ss.

Nat Schmulowitz, being first duly sworn, deposes and says: That he is one of the proctors for the appellant in the above-entitled proceeding; that heretofore, to wit, on the 23d day of February, 1917, he served a copy of the notice of filing bond on appeal, the original of which is attached hereto, and also a copy of the order heretofore made on the 23d day of February, 1917, directing that the bond originally filed in the above-entitled proceeding conditioned for the payment of the sum of Eight Thousand Five (\$8,005) Dollars be considered a bond to stay execution of the decree against Coggeshall Launch Company, a corporation, in the above-entitled cause by mailing copies of said documents and each thereof addressed to W. Ernest Dickson, Eureka, California, which said mailing was accomplished by the enclosure of said orders and each thereof in a sealed envelope and the deposit of said

sealed envelope, together with said enclosures and each thereof with postage prepaid thereon in the United States postoffice at San Francisco, California on said 23d day of February, 1917.

NAT SCHMULOWITZ.

Subscribed and sworn to before me this 24th day of February, 1917.

[Seal]

ELLA L. SMITH,

Notary Public in and for the City and County of San Francisco, State of California. [256]

[Endorsed]: Filed Feb. 24, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [257]

In the United States District Court in and for the Northern District of California, First Division.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Stipulation for Order Directing Transmission of Copy of Claim to Appellate Court.

WHEREAS, it appears that the original claim of Eliza A. Early, claimant, filed in this cause July 15th, 1915, has been lost from the records; and

WHEREAS, the parties have heretofore agreed that a copy of said claim might be submitted to and used by the trial court for all purposes in this cause to the same extent as the original claim so filed; and

WHEREAS, it being mutually agreed by and between the parties hereto that the said copy of the

claim be considered and used by the United States Circuit Court of Appeals in and for the Ninth Circuit to the same extent as the original claim in determining the appeal of the above-entitled cause:

It is hereby stipulated by and between the parties hereto that the above-entitled Court make its order directing the clerk of the above-entitled court to file the copy of the claim of the claimant, the same being a duplicate of the original claim filed July 15th, 1915, *nunc pro tunc* as of the 15th day of July, 1915, the said date of the filing of the original claim, and to transfer the said copy, with the apostles on appeal as required by the rules of the Circuit Court of Appeals, to the clerk of the [258] United States Circuit Court of Appeals, in and for the Ninth Circuit to be retained by said clerk in the same manner as the petition and answer and other apostles until the appeal of the above-entitled cause is properly disposed of at which time the said copy of claim and other papers and records in the cause is to be returned to the Clerk of the above-entitled court.

Dated this 7th day of April 1917.

CLARENCE COONAN,

NAT SCHMULOWITZ,

Proctors for Petitioners.

W. ERNEST DICKSON,

Proctor for Claimant. [259]

In the United States District Court in and for the Northern District of California, First Division.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Order Directing Transmission of Copy of Claim to the Appellate Court.

It being mutually agreed by and between the parties hereto that a copy of claimant's claim heretofore submitted to this Court in the above-entitled action be filed *nunc pro tunc* of July 15th, 1915, and should be submitted to and used by the United States Circuit Court of Appeals in and for the Ninth Circuit along with the other apostles in said cause in determining the appeal in the above-entitled cause:

It is hereby ordered that the clerk of the above-entitled court file the said claim of the claimant, Eliza A. Early, *nunc pro tunc* as of July 15th, 1915, and transfer the said copy of claimant's claim heretofore submitted to and used by this Court in determining this cause, to the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit along with the other apostles in said cause to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of at which time the said copy of claimant's claim and other apostles shall be returned to the clerk of the above-entitled Court.

Dated this 10th day of April, 1917.

M. T. DOOLING,
Judge of said District Court.

[Endorsed]: Filed Apr. 10, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [260]

Petitioner's Exhibit No. 1—Complaint.

*In the Superior Court of the County of Humboldt,
State of California.*

ELIZA A. EARLY,

Plaintiff,

vs.

HAMMOND LUMBER COMPANY (a Corpora-
tion), and THE COGGESHALL LAUNCH
COMPANY (a Corporation),
Defendants.

COMPLAINT.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That one George D. Early, now deceased, was at
the time of his death a minor of the age of twenty
years. That Eliza A. Early, plaintiff herein, is the
mother of said deceased. That James M. Early,
father of deceased has deserted his family and is
now, and at all times mentioned herein was, sepa-
rated from plaintiff herein by a decree of divorce,
and is now and was at all times mentioned herein
was living entirely separate and apart from his
family.

II.

That the Coggeshall Launch Company, one of the defendants named herein, is a Corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at Eureka, California.

III.

That the "Hammond Lumber Company," one of the defendants named herein is a corporation organized and existing under *and virtue* of the laws of the State of New Jersey, and has [261] its principal place of business in and for the State of California at Samoa, California.

IV.

That defendant Coggeshall Launch Company, is a common carrier and as such is engaged in the business of transporting passengers, for hire by boat between, Samoa and Eureka, both of said places being within the county of Humboldt, State of California, and operates in the business above mentioned, the steamer or ferry-boat known as "The Antelope."

V.

That the Hammond Lumber Company, one of the defendants above named is the owner of said steamer "Antelope" above mentioned, and as such owner is engaged in the business of carrying passengers for hire between said Eureka and said Samoa, and for the purpose of carrying on said business said Hammond Lumber Company employs said Coggeshall Launch Company to operate said "Antelope" and said Hammond Lumber Company is responsible for

the conduct of said Coggeshall Launch Company in said employment.

VI.

That on the 15th day of January, 1915, while a passenger on said "Antelope," with his fare for his passage paid thereon, and while said steamer was engaged in making one of its regular trips for the purpose of carrying passengers between said Samoa and said Eureka said George D. Early fell from said steamer "Antelope" and was drowned in the waters of Humboldt Bay.

VII.

That on the 15th day of January, 1915, and while defendants were running and operating said ferry-boat "Antelope" for the purpose of carrying passengers for hire, as aforesaid, they operated, conducted and ran said ferry-boat in a careless, [262] reckless, negligent and unlawful manner, in this that they failed, refused and neglected to place a bar or other safeguard across a certain open doorway on the lower deck of said ferry-boat "Antelope." That when the accident complained of occurred defendants were running and operating said ferry-boat with an insufficient crew, and the servant whose duty and custom it was to properly place said bar for the protection of passengers was sent to another part of the boat to perform some other duty and by reason of such careless, negligent, reckless and unlawful operating and running of said ferry-boat and by reason of defendants failing and neglecting to furnish a competent and sufficient crew and by defendants' neglect and refusal to place said bar or

other safeguard across said open doorway, said George D. Early fell through said open doorway *into* the waters of Humboldt Bay and was drowned as mentioned in paragraph VI herein, and that by reason of said drowning, plaintiff has been damaged in the sum of \$50,000.

And for a further and second cause of action, plaintiff here complains and alleges:

I.

Plaintiff hereby refers to paragraphs I, II, III, IV, V and VI of the first cause of action herein and hereby makes said paragraphs a part of this cause of action as if incorporated herein.

II.

That on the 15th day of January, 1915, and for a long time prior thereto, it had been the fixed custom and habit of defendants to allow passengers to ride on the lower deck of said ferry-boat "Antelope." That said lower deck is almost on a level with the water and is enclosed. That through said enclosure [263] there is a wide doorway, through which it is, and was at all times mentioned herein, the practice of defendants to load and unload both freight and passengers, while said boat was at a wharf or landing, but when out in the water away from any landing said doorway opens right out to the water. That it is and at all times herein mentioned was the fixed custom for defendants to safeguard passengers from falling through said doorway, by placing a bar across the same while the boat is on its way between ports, and was the only safeguard so used. That said George D. Early, deceased, had been for a long

time prior to the said day of January, 1915, a regular passenger on said boat, going to and from his work on the daily trips of said boat and had always been accustomed to see the afore-mentioned bar across said doorway, and relied on its being in place for his protection. That on the said 15th day of January, 1915, defendants had carelessly, negligently and unlawfully failed and neglected to place or have placed said bar in its accustomed position, and said George D. Early, deceased, thinking that it was there as usual, and relying upon its being there, and relying upon the duty of defendants as common carriers to place said bar in its accustomed and proper place, and by reason and because of its not being in its accustomed position, and by defendants' carelessness and negligence in that regard, and while riding as a passenger upon said boat, fell through said open doorway into the waters of Humboldt Bay and was drowned, by reason of which this plaintiff has been damaged in the sum of \$50,000.

And for a further and third cause of action plaintiff complains and alleges:

I.

Plaintiff hereby refers to paragraphs I, II, III, IV, V [264] and VI of the first cause of action and to paragraph II of the second cause of action herein and makes said paragraphs a part of this cause of action as if incorporated herein.

II.

That when said George D. Early fell into the water as set forth in the first and second causes of action herein, defendants, their servants and em-

ployees were immediately notified of the facts of his so falling. That thereupon it became the duty of defendants, their servants and employees to exert every effort to save said George D. Early from death by drowning. That said George D. Early was a good swimmer, and with ordinary skill and care and effort, defendants could easily have provided means to rescue him from drowning. But through their carelessness and inattention and utter disregard of their duty in that behalf, defendants failed, neglected and refused to offer any aid or assistance to the said George D. Early, although they had ample opportunity to do so. That by reason of said carelessness and neglect on defendants part said George D. Early was left to drown without aid or assistance of any kind and because of said carelessness and neglect did drown, which has caused the plaintiff damage in the sum of \$50,000.

And for a further and fourth cause of action plaintiff complains and alleges:

I.

Plaintiff hereby refers to paragraphs I, II, III, IV, V and VI of the first cause of action and to paragraph II of the second cause of action herein and makes said paragraphs a part of this cause of action as if incorporated herein. [265]

II.

That when said George D. Early fell into the water as set forth in the first and second causes of action herein, defendants and their agents and their employees were immediately notified of his so falling. That it thereupon became the duty of the cap-

tain of said ferry-boat to stop said boat and offer aid and assistance to said George D. Early who was struggling in the water. But because of the negligence and lack of skill in handling and operating said boat the said captain failed, refused and neglected to stop said boat, until it was too late to offer assistance to said George D. Early and as a consequence thereof he was left to drown and did drown in the waters of Humboldt Bay. By reason whereof this plaintiff has been damaged in the sum of \$50,000.

WHEREFORE PLAINTIFF PRAYS JUDGMENT against defendant in the sum of \$50,000 and for costs of this action.

W. ERNEST DICKSON,
Attorney for Plaintiff.

VERIFICATION OF COMPLAINT.

Eliza A. Early, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the facts stated therein are true of her own knowledge, except as to those facts therein stated on her information and belief, and as to them she believes them to be true.

ELIZA A. EARLY.

Subscribed and sworn to before me this 1st day of February, 1915.

[Seal] W. ERNEST DICKSON,
Notary Public in and for the County of Humboldt,
State of California.

[Endorsed]: No. 7173. Filed Feb. 3, 1915. Fred M. Kay, County Clerk. [266]

State of California,
County of Humboldt,—ss.

I, Fred M. Kay, County Clerk of the county of Humboldt, State of California, and ex-officio clerk of the Superior Court in and for said Humboldt County (which is a Court of Record), do hereby certify that the foregoing is a full, true and correct copy of the original Complaint in the Action of Eliza A. Early, Plaintiff, vs. Hammond Lumber Company (a Corporation), and The Coggeshall Launch Company, Defendants, as the same now appears on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Superior Court of Humboldt County, this 5th day of July, A. D. 1916.

[Seal]

FRED M. KAY,

County Clerk and ex-officio Clerk of the Superior
Court of Humboldt County.

By Ralph I. Warren,

Deputy.

[Revenue Stamp]

[Endorsed]: U. S. Dist. Court. 15,794. In Re Petn. to Limit Liability of S. Vessel "Antelope," etc. Petnrs. Exhibit 1. Filed July 6, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[267]

In the United States District Court, in and for the Northern District of California, First Division.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY, a Corporation, and HAMMOND LUMBER COMPANY, a Corporation, Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Stipulation for Order Directing Transmission of Original Exhibits to Appellate Court.

It being mutually agreed by and between the parties hereto that Claimant's Exhibits "A" and "B" offered and received in evidence in the above-entitled action should be inspected by the United States Circuit Court of Appeals in and for the Ninth Circuit in determining the appeal of the above-entitled cause,—

IT IS HEREBY STIPULATED by and between the parties hereto that the above-entitled court may make its order directing the clerk of the above-entitled court to transfer the original copies of Claimant's Exhibits "A" and "B" to the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit to be retained by said clerk until the appeal of the above-entitled cause is properly disposed of, at which time the said original papers and records are to be returned to the clerk of the above-entitled court.

Dated this 7 day of April, 1917.

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Petitioner.
W. ERNEST DICKSON,
Proctor for Claimant. [268]

*In the United States District Court, in and for the
Northern District of California, First Division.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

**Order Directing Transmission of Original Exhibits
to the Appellate Court.**

It being mutually agreed by and between the parties hereto that Claimant's Exhibits “A” and “B” offered and received in evidence in the above-entitled action should be inspected by the United States Circuit Court of Appeals in and for the Ninth Circuit in determining the appeal in the above-entitled cause,—

IT IS HEREBY ORDERED that the clerk of the above-entitled court transfer the original copies of Claimant's Exhibits “A” and “B” to the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the said original papers and records shall be returned to the clerk of

the above-entitled court.

Dated this 10th day of April, 1917.

M. T. DOOLING,

Judge of the District Court.

[Endorsed]: Filed Apr. 10, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [269]

*In the United States District Court for the North-
ern District of California, Southern Division.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel
"ANTELOPE," for Limitation of Liability.

**Stipulation and Order Extending Time to Docket
Record on Appeal.**

It is hereby stipulated and agreed that the time
for printing the record and filing and docketing this
cause on appeal in the United States Circuit Court
of Appeals for the Ninth Circuit may be extended to
and including the 4th day of April, 1917.

CLARENCE COONAN,

NAT SCHMULOWITZ,

Proctors for Petitioner.

W. ERNEST DICKSON,

Proctor for Claimant.

Pursuant to the foregoing stipulation, it is hereby
ordered that the time for printing the record and
filing and docketing this cause on appeal in the
United States Circuit Court of Appeals for the
Ninth Circuit be and the same is hereby enlarged

and extended to and including the 4th day of April, 1917.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [270]

*In the United States District Court for the North-
ern District of California, Southern Division.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a Cor-
poration, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

**Stipulation and Order Extending Time to Docket
Record on Appeal.**

It is hereby stipulated and agreed that the time
for printing the record and filing and docketing this
cause on appeal in the United States Circuit Court
of Appeals for the Ninth Circuit may be extended
to and including the 14th day of April, 1917.

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Petitioner.
W. ERNEST DICKSON,
Proctor for Claimant.

Pursuant to the foregoing stipulation it is hereby
ordered that the time for printing the record and
filing and docketing this cause on appeal in the
United States Circuit Court of Appeals for the
Ninth Circuit be and the same is hereby enlarged

and extended to and including the 14th day of April, 1917.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [271]

*In the United States District Court for the Northern
District of California, Southern Division.*

In the Matter of the Petition of COGGESHALL
LAUNCH COMPANY, a Corporation, and
HAMMOND LUMBER COMPANY, a
Corporation, Owners of the Steam Vessel
“ANTELOPE,” for Limitation of Liability.

**Stipulation and Order Extending Time to Docket
Record on Appeal.**

It is hereby stipulated and agreed that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be extended to and including the 26th day of April, 1917.

CLARENCE COONAN,
NAT SCHMULOWITZ,
Proctors for Petitioner.

W. ERNEST DICKSON,
Proctor for Claimant.

Pursuant to the foregoing stipulation it is hereby ordered that the time for printing the record and filing and docketing this cause on appeal in the United States *Circuit of Appeals* for the Ninth Cir-

cuit be and the same is hereby enlarged and extended to and including the 26th day of April, 1917.

April 16th, 1907.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: Apr. 16, 1917. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [272]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 272 pages, numbered from 1 to 272, inclusive, to contain a full, true, and correct transcript of certain records and proceedings, in the matter of the Petition of Coggeshall Launch Company, a Corp., and Hammond Lumber Company, a Corp., Owners of the Steam Vessel "Antelope," for a Limitation of Liability,—In Admiralty, No. 15,794,—as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with "Amended Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of attorneys for petitioners and appellants, herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of One Hundred Thirty-eight Dollars and Sixty Cents (\$138.60), and that the same has been paid to

me by the attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of April, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [273]

CMT.

[Endorsed]: No. 2975. United States Circuit Court of Appeals for the Ninth Circuit. Coggeshall Launch Company, a Corporation, Appellant, vs. Eliza A. Early, Claimant, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed April 25, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

Certificate of Clerk U. S. District Court to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the annexed documents (two in number) known as and marked:

Claimant's Exhibit "A" (Certificate of Inspection)

Claimant's Exhibit "B" (Commutation-book) are original exhibits, introduced and filed in the matter of the Petition of Coggeshall Launch Co., a Corp. and Hammond Lumber Co., a Corp., Owners of the Steam Vessel "Antelope," for Limitation of Liability, No. 15,794, and are herewith transmitted to the U. S. Circuit Court of Appeals, for the Ninth Circuit, in accordance with order of this Court, dated April 10th, 1917. Copy of Original Claim of Eliza A. Early is also transmitted herewith, in its original form, as per order of Court, dated April 10th, 1917; copies of both of above-mentioned orders are embodied in the Apostles on Appeal, herewith transmitted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of April, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT.

[Endorsed]: No. 2975. United States Circuit Court of Appeals for the Ninth Circuit. Coggeshall Launch Company, a Corporation, vs. Eliza A. Early, Claimant. Certificate of Clerk U. S. District Court to Original Exhibits. Filed Apr. 25, 1917. F. D. Monckton, Clerk.

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,794.

In the Matter of the Petition of COGGESHALL LAUNCH COMPANY (a Corporation), and HAMMOND LUMBER COMPANY (a Corporation), Owners of the Steam Vessel "ANTELOPE," for Limitation of Liability.

Claim of Eliza A. Early.

To the Hon. MAURICE T. DOOLING, Judge of the United States District Court for the Northern District of California, First Division and to FRANCIS KRULL, Esq., United States Commissioner for Said Court.

Now comes Eliza A. Early, hereinafter called Claimant, and without waiving her right to protest the jurisdiction of the said Court to entertain said proceedings for Limitation of Liability, files her claim herein, and alleges as follows:—

I.

That one George D. Early, now deceased, was at the time of his death, a minor of the age of twenty years. That Eliza A. Early, Claimant herein, is the mother of said deceased. That James M. Early,

father of deceased has deserted his family and is now, and at all times mentioned herein was, separated from Claimant herein by a decree of divorce, and is now and was at all times mentioned herein, living entirely separate and apart from his family, and under the provisions of Section 376 of the Code of Civil Procedure of the State of California, said Eliza A. Early, has the right to prosecute the action hereinafter mentioned in the Superior Court of the State of California, and is prosecuting said action under and by virtue of said statutory right thus given her.

II.

That petitioner herein, the Hammond Lumber Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and has its principal place of business for the State of California at Samoa, California.

That the Coggeshall Launch Company, one of the Petitioners herein named, is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at Eureka, California.

III.

That on or about the 3d day of February 1915, Claimant herein, did file her complaint against Petitioners named herein, in the Superior Court of the State of California, in and for the County of Humboldt, in that certain suit No.7173 entitled; Eliza A. Early, Plaintiff, vs. Hammond Lumber Company (a Corporation), and The Coggeshall Launch Company (a Corporation), Defendants and that thereafter, and

prior to the filing of the petition herein, both of the Defendants above named, appeared in the said Superior Court and each filed its separate demurrer to said complaint: Thereafter on or about the 23d day of June 1915, Claimant did file in said Superior Court, her amended complaint, and served same upon Petitioners herein, and in said amended complaint asked for judgment in the sum of seventy-five hundred (\$7,500.00) dollars, which is less than the appraised valuation of the said steamer "Antelope" as set forth in the commissioners report appointed by this Court for the purpose of said appraisement: That the cause of action set forth and described in said amended complaint is in all respects the same as the one set forth in this claim, and that this is the only claim filed in this proceedings, and that this claim is for the sum of seventy-five hundred (\$7,500.00) dollars, which is less than the value of said steamer "Antelope."

IV.

That the Petitioners herein, are the owners of said Steamer Antelope, above mentioned, and as such owners are engaged in the business of carrying passengers for hire between the said city of Eureka, and the said City of Samoa on the waters of Humboldt Bay; That on the 15th day of January 1915, while a passenger on said Steamer Antelope, with his fare for his passage paid thereon, and while said steamer was engaged in making one of its regular trips for the purpose of carrying passengers between said Eureka, and said Samoa, the said George D. Early fell from the said Steamer Antelope,

and was drowned in the waters of Humboldt Bay: That on the said 15th day of January 1915, and while Petitioners were running and operating said ferryboat Antelope for the purpose of carrying passengers for hire as aforesaid, that they operated, conducted and ran said ferryboat in a careless, reckless, negligent and unlawful manner, in this; that when the accident complained of occurred, Petitioners were running and operating said ferryboat with an insufficient crew, and with a crew of less number than is required by the United States Steamboat regulations; that the servant on said ferryboat Antelope whose duty and custom it was to properly place a certain bar (hereinafter described) in its place for the protection of passengers, was not on said Steamer Antelope, and that no other servant was hired or put in his place, as a consequence of which, said bar was not in its proper place for the protection of passengers, and that said bar had always been used as the safeguard across a certain open doorway on the lower deck of the said ferryboat Antelope, and by reason of Petitioners failure and negligence to furnish a competent and sufficient crew, and by Petitioners failure and refusal to place said bar or other safeguard across said open doorway said George D. Early fell through the said open doorway into the water of Humboldt Bay, and was drowned as mentioned above and that by reason of said drowning Claimant herein has been damaged in the sum of seventy-five hundred (\$7,500.00) dollars.

And for further detailed specifications Claimant

alleges, that on the 15th day of January 1915, and for a long time prior thereto, it had been the fixed custom and habit of Petitioners to allow passengers to ride on the lower deck of said Steamer Antelope. That said lower deck is almost on a level with the water and is enclosed. That through said enclosure there is a wide doorway through which it is, and was at all times mentioned herein the practice and custom of Petitioners to load and unload both freight and passengers, while said boat was at a wharf or landing, but when out in the water away from any landing said doorway opens right out to the water. That it is and at all times herein mentioned was the fixed custom for Petitioners to safeguard passengers from falling through said open doorway by placing a bar across the same while the boat was on its way between ports, and that this was the only safeguard so used. That said George D. Early, deceased, had been for a long time prior to the said 15th day of January 1915, a regular passenger on said boat and had always been accustomed to see the forementioned bar across said doorway, and relied on its being in place for his protection. That on the said 15th day of January 1915, Petitioners had carelessly, negligently and unlawfully failed and neglected to place or have placed said bar in its accustomed position, and said George D. Early, deceased, thinking that it was there as usual, and relying upon its being there, and relying upon the duty of Petitioners as common carriers to place said bar in its accustomed and proper place, and by reason and because of its not being in its accustomed position, and by Peti-

tioners carelessness and negligence in that regard, and while riding as a passenger on said boat he fell through said open doorway into the waters of Humboldt Bay, and was drowned, by reason of which this Claimant has been damaged in the sum of seventy-five hundred (\$7,500.00) dollars.

And for a further, second and separate cause of action, Claimant alleges:

I.

Claimant hereby refers to paragraphs I, II, III, and IV, of the first cause of action herein, and hereby makes said paragraphs a part of this cause of action as if same were incorporated herein.

II.

That when said George D. Early fell into the water as set forth above in the first cause of action herein, Petitioners, their servants and employees were immediately notified of the fact of his so falling. That thereupon it became the duty of Petitioners, their servants and employees to exert every effort to save said George D. Early from death by drowning. That said George D. Early was a good swimmer, and with ordinary skill and care and effort, Petitioners could easily have provided means to rescue him from death by drowning. But through their carelessness and inattention and utter disregard of their duty in that behalf, Petitioners, failed, neglected and refused to offer any aid or assistance to said George D. Early, although they had ample opportunity to do so.

That when said George D. Early fell into the water as set forth above Petitioners, their agents and employees, were immediately notified of his so falling,

and that it thereupon became the duty of Petitioners, their agents and employees to stop said steamer Antelope and offer aid and assistance to said George D. Early who was struggling in the water, but because of the lack of skill on the part of the Captain of said boat, said Captain failed refused and neglected to stop said boat, until it was too late to save said George D. Early from death by drowning, and as a consequence thereof and by reason of said negligence on the part of said Petitioners their agents and employees, said George D. Early was left to drown and did drown in the waters of Humboldt Bay, and that by reason of said drowning Claimant herein has been damaged in the sum of seventy-five hundred (\$7,500.00) dollars.

WHEREFORE CLAIMANT PRAYS: that said Petition for Limitation of Liability be dismissed as to this Claimant, and that if same be not dismissed, the Claimant herein in any event be dismissed with full rights to continue the said suit in the said Superior Court of the State of California, and that if the Court compel this Claimant to allege a special cause of action in this suit, the Court decree that Petitioners herein be required to pay liability to Claimant in the sum of seventy-five hundred (\$7,500.00) dollars, together with interest and costs.

W. ERNEST DICKSON.

Proctor for Claimant.

VERIFICATION.

United States of America,
State of California,
County of Humboldt,—ss.

Eliza A. Early, being first duly sworn, deposes and says:

That she is the Claimant in the above-entitled cause of action; that she has read the foregoing claim, and knows the contents thereof; that the allegations of same, and each thereof is, to the best of her knowledge, information and belief the truth as therein stated and set forth.

ELIZA A. EARLY.

Subscribed and sworn to before me this 24th day of June, 1915.

[Seal] W. ERNEST DICKSON,
Notary Public in and for the County of Humboldt,
State of California.

It is hereby stipulated that this document is a correct copy of the claim originally filed by claimant Eliza A. Early, and that to all intents and purposes this copy may be viewed and considered as the original claim, Jan. 19, 1917.

CLARENCE COONAN,

Atty. for Petitioners.

[Endorsed]: In Admiralty—No. 15,794. In the United States District Court for the Northern District of California, First Division. In the Matter of the Petition of Coggeshall Launch Company (a Corporation), and Hammond Lumber Company (a Corporation), Owners of the Steam Vessel Antelope for


Limitation of Liability. Claim of Eliza A. Early.
Filed July 18, 1915. Filed April 10, 1917. *Nunc pro tunc* as of Jul. 15-15. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk.

No. 2975. U. S. Circuit Court of Appeals for the
Ninth Circuit. Exhibit—Claim of Eliza A. Early.
Filed Apr. 25, 1917. F. D. Monckton, Clerk.

Claimant's Exhibit "A"—Certificate of Inspection.

No. 409911.

Carbon Triplicate.

 This Receipt to be Given Payor

A receipt of this form must always be given when
money is paid at the Custom House on ac-
count of any of the following items:

District of
Port of San Francisco,

June 30, 1916.

Am. Str. Antelope

(Nationality, rig and name of vessel).

Official No.Net Tons.....

Arrived from....., 191...
To be collected. Fee No. Amount.

Navigation fine, penalty, or for-
feiture:

Case No.

Deceased Passengers, No.

Navigation fees:

Admeasurement (Specify ser-
vice),

Receiving Manifest,

Clearance,		
Entry,		
Post Entry,		
Bond,		
Bill of Health,.....		
Permit to		
Surveyor's Services,		
2 Certified copies of Inspection	18	40
Certificate of		
Recording of		
Total,		40

Received payment of the above amount from W. E.
Dickson, Agt. F. J. Halpin of the above named vessel.


(Master, Agent, or Owner)

for Collector of Customs.

Do not accept this receipt unless it is a carbon copy.

Countersigned: (Remitted by mail), Payor.

A. Berryessa, Naval Office Clerk.

 The person to whom this receipt is given is requested to countersign the "Original," and in the event of his not doing so, or of "Original" not being out when offered for signature, to inform the COMMISSIONER OF NAVIGATION, DEPARTMENT OF COMMERCE, Washington, D. C.

In all cases of violations of the navigation laws, except where the offense constitutes a misdemeanor, the payor has the privilege of appeal under oath to the Secretary of Commerce for mitigation or remission of the penalty incurred. This appeal should state the circumstances under which the violation occurred and the reasons therefor and should be sent to the customs officer to whom the money was paid, by whom it will be forwarded to the Department of Commerce and the payor will be notified of the action finally taken.

The following references bear on the above subject :

R. S., 5292, 5293, 5294 and 5295 ;

Act of June 26, 1884, Sec. 26 (23 Stat., 53) ;

Act of December 15, 1894 (28 Stat., 595) ;

Act of March 2, 1896 (29 Stat., 39) ;

Act of March 3, 1897, Sec. 13 (29 Stat., 687) ;

Act of March 3, 1899, Sec. 175 (30 Stat., 1253) ;

Act of February 14, 1903, Sec. 10 (32 Stat., 825).

[Ten Cents U. S. Internal Revenue Stamp. Canceled 6/30/16. H. E. F.]

Form 841.

File No. V—1638.

This Certificate expires January 19, 1915.

UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

STEAMBOAT-INSPECTION SERVICE

[Stamped in margin:] Permission to use petroleum as fuel on this steamer issued by the Secretary of Commerce and Labor, dated Nov. 6, 1911, on file in office of Local Inspectors at San Francisco, Cal.
CERTIFICATE OF INSPECTION FOR STEAM
OR MOTOR VESSEL

State of California,

District of San Francisco.

Steam Ferry Vessel Antelope.

Application in writing having been made to the undersigned, Inspectors for this District, to inspect the above-named vessel propelled by steam, of Jersey City, in the State of New Jersey, whereof The Hammond Lumber Company is owner, and F. C. Krohncke is Master, said inspectors, having completed the inspection of the vessel on the 19th day of January, 1914, DO CERTIFY that the said vessel was built at Eureka, in the State of California, in the year 1909; rebuilt in the year 1——; that the Hull is constructed of wood; and, as shown by official records, is of 160 gross tons; that the said vessel has — Staterooms and — Berths, and is allowed to carry

— passengers, viz: — First-cabin, — Second-cabin, and — Deck or Steerage Passengers;

The character of this vessel is changed to that of a freight steamer between the hours of 8 a. m. and 5 p. m. daily, except Sunday.

This vessel is also allowed to be employed as a passenger steamer, carrying fifteen (15) passengers, on Humboldt Bay to South Jetty.

also is required to carry a full complement of officers and crew, consisting of — licensed Master, 1 licensed Master and Pilot, — licensed Pilot, — licensed Mate, — Quartermaster, — Seamen, 2 Deck Hands, 1 licensed Chief Engineer, — licensed Assistant Engineer, — licensed Junior Engineer, — Water Tender, 1 Oiler, — Firemen, — Coal Passer, — Wiper, — Watchman, and also — persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with One Compound Condensing Engine of 14 $\frac{3}{16}$ and 28 $\frac{5}{8}$ inches diameters of cylinders and 3 feet stroke of piston, and 1 Boiler, 16 feet in length and 60 inches in diameter, made of lawful steel, in the year 1903, rebuilt in the year 1—. The said vessel is permitted to navigate, for one year, the waters of Humboldt Bay between Samoa, Hendes, Fairhaven Shipyard, Eureka, and Life Saving Station and touching at intermediate ports, a distance of about — miles and return.

WE FURTHER CERTIFY that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat-Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF
INSPECTION ARE ENUMERATED,
NAMELY:

Anchors, No. 2.....	Cables, No. 2
.....	—
Compasses	No. 1
Has signal lights	Yes
Metal lifeboats	No. 2
Wooden lifeboats	No. —
Working boat	No. 1
Collapsible lifeboats	No. —
Every lifeboat has equipment in accordance with rules	Yes
.....	
.....	
Life rafts	No. —
Life preservers	No. 209
Auxiliary life-saving appliances, No. and kind	
2 cork rings	
.....	
Has line-carrying projectiles, and means of propelling them	
Fire extinguishers	No. 3
Portable hand fire pumps	No. —
Double-acting hand fire pumps,	No. 1
Hose—Internal diameter of, inches.....	1½
Length of	feet 200
Fire buckets	No. 8

Water barrels	No. —
Water tanks	No. —
Axes	No. 2

MAIN BOILERS.

Boiler plate:	
Thickness of44"
Tensile strength of	60000
Record in local inspectors' office at	
San Francisco, Cal.	

Boiler shell....drilled Jan. 17, 1913.

 Thickness of plate found .44/00 inch.

Longitudinal seams double riveted.

 Holes drilled.

Maximum steam pressure allowed 150 lbs.

Hydrostatic pressure applied 225 lbs.

Steam pipe:

 Material Steel.

 Diameter 5"

 Thickness Ex. heavy.

Feed pumps for boilersNo. 3

Steam fire pumps, double-acting,No. 1

DONKEY BOILERS.

No.*.....	When built, 1
Diam*eter of	
Thickne*ss of plate	
Tensile str*ength of plate	
Record in loca*l inspectors' office at.....	
.....*	
.....*	

Maximum steam pressur*e allowed to donkey boiler,
.....*..... pounds.
Hydrostatic pressure applied *to donkey boiler,
.....**** pounds

JAMES GUTHRIE, Inspector of Hulls.

JOSEPH P. DOLAN, Inspector of Boilers.

State of California,

San Francisco,—ss.

Subscribed and sworn to before me this 21st day

(Sworn or affirmed.)

January, 1914, by James Guthrie, Inspector of
Hulls, and by Joseph P. Dolan, Inspector of Boilers.

N. S. FARLEY,

Deputy Collector of Customs.

Customhouse, San Francisco, Cal., June 9, 1916.

I HEREBY CERTIFY that the above certificate
is a true copy of the original on file in this office.

[Seal]

H. E. FARMER,

Acting Deputy Collector of Customs.

HWM.

No. 18, Fee 20¢.

On vessels of over 100 gross tons, two copies of this
certificate must be framed under glass and posted in
conspicuous places in the vessel where they will be
most likely to be observed by passengers and others.
On vessels of over 25 and not over 100 gross tons,
two copies of this certificate must be kept on board,
one copy of which must be framed under glass and
placed in a conspicuous place in the vessel where it
will be most likely to be observed by passengers and
others. On vessels of not over 25 gross tons, two

copies of this certificate must be kept on board to be shown on demand. (*Section 4423, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Steamboat-Inspection Service.

[Stamped:] Cashier's Office, Customhouse, San Francisco. Paid Jun. 30, 1916. A. B.

Form 841. Department of Commerce. Steamboat-Inspection Service. Certificate of Inspection for Steam Vessel Named Antelope. Gross Tonnage
(Steam or motor.)

nage 160. Owner The Hammond Lumber Company. Inspectors, James Guthrie, Joseph P. Dolan. Certificate received at Customhouse January 21, 1914. Certified copies issued by Customs Officer to Master or Owner of Vessel. January 22, 1914.

Form 841.

File No. V—2108.

[Ten Cents U. S. Internal Revenue Stamp. Canceled 6/30/16. H. E. F.]

This Certificate expires January 19, 1916.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
STEAMBOAT-INSPECTION SERVICE

[Stamped in margin:] Permission to use petroleum as fuel on this steamer issued by the Secretary of Commerce and Labor, dated Nov. 6, 1911, on file in office of Local Inspectors at San Francisco, Cal.

CERTIFICATE OF INSPECTION FOR STEAM
OR MOTOR VESSEL

State of California,

District of San Francisco.

Steam Ferry Vessel Antelope.

Application in writing having been made to the undersigned, Inspectors for this District, to inspect the above-named vessel propelled by steam, of Jersey City, in the State of New Jersey, whereof The Hammond Lumber Company is owner, and F. C. Krohncke is Master, said inspectors, having completed the inspection of the vessel on the 19th day of January, 1915, DO CERTIFY that the said vessel was built at Eureka, in the State of California, in the year 1909; rebuilt in the year 1——; that the Hull is constructed of wood; and, as shown by official records, is of 160 gross tons; that the said vessel has — Staterooms and — Berths, and is allowed to carry — passengers, viz: — First-cabin, — Second-cabin, and — Deck or Steerage Passengers;

The character of this vessel is changed to that of a freight steamer between the hours of 8 a. m. and 5 p. m. daily, except Sunday.

This vessel is also allowed to be employed as a passenger steamer, carrying fifteen (15) passengers, on Humboldt Bay to South Jetty.

also is required to carry a full complement of officers and crew, consisting of — licensed Master, 1 licensed Master and Pilot, — licensed Pilot, — licensed Mate, — Quartermaster, — Seamen, 2 Deck Hands, 1 licensed Chief Engineer, — licensed Assistant Engineer, — licensed Junior Engineer, — Water Tender, — Oiler, 1 Firemen, — Coal Passer, — Wiper, — Watchman, and also — persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with One Compound Condensing Engine of 14 $\frac{3}{16}$ and 28 $\frac{5}{8}$ inches diameters of cylinders and 3 feet stroke of piston, and 1 Boiler, 16 feet in length and 60 inches in diameter, made of lawful steel, in the year 1903, rebuilt in the year 1—. The said vessel is permitted to navigate, for one year, the waters of Humboldt Bay between Samoa, Hendes, Fairhaven Shipyard, Eureka, and Life Saving Station and touching at intermediate ports, a distance of about — miles and return.

WE FURTHER CERTIFY that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat-Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF
INSPECTION ARE ENUMERATED,
NAMELY:

Anchors, No. 2.....	Cables, No. 2
.....	—
Compasses	No. 1
Has signal lights	Yes
Metal lifeboats	No. 2
Wooden lifeboats	No. —
Working boat	No. 1
Collapsible lifeboats	No. —
Every lifeboat has equipment in accordance with rules	Yes
.....
.....
Life rafts	No. —
Life preservers	No. 250
Auxiliary life-saving appliances, No. and kind
2 cork rings
.....
Has line-carrying projectiles, and means of propelling them
Fire extinguishers	No. 5
Portable hand fire pumps	No. —
Double-acting hand fire pumps,	No. 1
Hose—Internal diameter of, inches.....	1½
Length of	feet 200
Fire buckets	No. 8
Water barrels	No. —
Water tanks	No. —
Axes	No. 2

MAIN BOILERS.

Boiler plate:

Thickness of44"

Tensile strength of60000

Record in local inspectors' office at

San Francisco, Cal.

Boiler shell....drilled Jan. 17, 1913.

Thickness of plate found .44/00 inch.

Longitudinal seams double riveted.

Holes drilled.

Maximum steam pressure allowed 150 lbs.

Hydrostatic pressure applied 225 lbs.

Steam pipe:

Material Steel.

Diameter 5"

Thickness Extra heavy.

Feed pumps for boilersNo. 3

Steam fire pumps, double actingNo. 1

DONKEY BOILERS.

No.* ***.....When built, 1

Diam*eter of

Thickne*ss of plate

Tensile str*ength of plate

Record in loca*l inspectors' office at.....

.....*

.....*

Maximum steam pressur*e allowed to donkey boiler,

.....*..... pounds.

Hydrostatic pressure applied *to donkey boiler,

.....****pounds

JAMES GUTHRIE, Inspector of Hulls.

JOSEPH P. DOLAN, Inspector of Boilers.

State of California,
San Francisco, ss.

Subscribed and sworn to before me this 27th day
(Sworn or affirmed.)

January, 1915, by James Guthrie, Inspector of
Hulls, and by Joseph P. Dolan, Inspector of Boilers.

T. J. BARRY,

Acting Collector of Customs.

Customhouse, San Francisco, Cal., June 9, 1916.

I HEREBY CERTIFY that the above certificate
is a true copy of the original on file in this office.

[Seal]

H. E. FARMER,

Acting Deputy Collector of Customs.

HWM.

No. 18, Fee 20¢.

On vessels of over 100 gross tons, two copies of this certificate must be framed under glass and posted in conspicuous places in the vessel where they will be most likely to be observed by passengers and others. On vessels of over 25 and not over 100 gross tons, two copies of this certificate must be kept on board, one copy of which must be framed under glass and placed in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, two copies of this certificate must be kept on board to be shown on demand. (*Section 4423, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change

of character by the Inspectors of the Steamboat-Inspection Service.

Cashier's Office, Customhouse, San Francisco.
Paid Jun. 30, 1916. A. B.

Form 841. Department of Commerce. Steamboat-Inspection Service. Certificate of Inspection for Steam Vessel Named Antelope. Gross Ton-
(Steam or motor.)

nage 160. Owner The Hammond Lumber Company. Inspectors, James Guthrie, Joseph P. Dolan. Certificate received at Customhouse January 27, 1915. Certified copies issued by Customs Officer to Master or Owner of Vessel. January 28, 1915.

U. S. Dist. Court. 15794. In re Petn. to Limit Liability of Owners of Steam Vessel "Antelope," etc. Claimant's Exhibit "A." Filed July 6th, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. Case No. 2975. U. S. Circuit Court of Appeals for the Ninth Circuit. Claimant's Exhibit "A." Filed Apr. 25, 1917. F. D. Monckton, Clerk.

Claimant's Exhibit "B"—Commutation Book.

SPECIAL RATE MONTHLY TICKET

Between

EUREKA AND SAMOA

I have read the conditions printed herein and agree to use this ticket in compliance therewith.

**COUPONS NOT GOOD UNLESS DETACHED
IN PRESENCE OF COLLECTOR**

—————Purchaser.

Book No. 364

Conditions

In consideration of this ticket being sold at a reduced rate the purchaser agrees to use it subject to the following terms and conditions:

First. This company reserves the right to change the stopping places and time schedules and reduce the number of daily trips of its boats without notice, and does not guarantee that purchaser will reach destination at a specified time.

Second. That this ticket is not transferable and is issued for the personal use of the purchaser whose name is signed hereon. If presented in payment of fare by any other than the person named, the ticket will be forfeited.

Third. That it will be honored only on the date and during the month printed hereon.

(Continued on third page of cover)

Coggeshall Launch Company

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

1

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

1

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

2

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

2

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

3

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

3

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Company

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

4

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

4

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

5

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

5

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

6

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

6

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Company

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

7

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

7

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

8

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

8

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

9

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

9

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Company

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

10

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

10

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

11

Between

Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

11

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

12

Between
Eureka and Samoa

No Baggage

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Good for One Continuous
Passage on
MAY, 1916.

12

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Company

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

13

Between
Eureka and Samoa

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Good for One Continuous
Passage on
MAY, 1916.

13

Between
Eureka and Samoa

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Good for One Continuous
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MAY, 1916.

14

Between
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Good for One Continuous
Passage on
MAY, 1916.

14

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

15

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

15

Between
Eureka and Samoa

No Baggage

*Coggeshall Launch Company*Coggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

16

Between

Eureka and SamoaNo BaggageCoggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

16

Between

Eureka and SamoaNo BaggageCoggeshall Launch Co.

Good for One Continuous

Passage on

MAY, 1916.

17

Between

Eureka and SamoaNo Baggage

vs. Eliza A. Early.

363

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

21

Between
Eureka and Samoa

No Baggage

Coggeshall Launch Co.

Good for One Continuous
Passage on
MAY, 1916.

21

Between
Eureka and Samoa

No Baggage

Fourth. That if lost it will not be replaced.

Fifth. That no portion of the money paid for this ticket will be refunded on account of loss or inability of purchaser to use ticket before date of expiration.

Sixth. That in event of interruption of service due to storms, wreck, fire or other causes beyond the control of this company, there shall be no obligation to refund any portion of the purchase price of this ticket, nor indemnify the purchaser in any amount whatever on account of failure of purchaser to reach destination within a particular time.

No transfers issued on this ticket.

E. P. Co. 31182

COGGESHALL LAUNCH

Boats to All Points

On Humboldt Bay

Telephone 249

[Endorsed]: U. S. Dist. Court. 15,794. In Re Limit. Liab. "Antelope" etc. Clmts. Exhibit "B." Filed July 6, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2975. U. S. Circuit Court of Appeals for the Ninth Circuit. Claimant's Exhibit "B." Filed Apr. 25, 1917. F. D. Monckton, Clerk.

